SUPREME COURT, U.S.

No. 418

AUG 30 1957
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

LAWRENCE JOHNSON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

WILLIAM KLEINMAN
Attorney for Appellant
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INDEX

PAGE

Docket Entries 1

Testimony 3

Testimony of Lawrence Johnson Before Grand Jury Read into Record 7, 14, 35

Order of Judgment and Commitment Appealed From 198

Notice of Appeal 200

GOVERNMENT'S WITNESSES

Emily J. Cordes:
Direct 13

Louis Benson:
Direct 34

Anthony Scadari:
Direct 49
Cross 52
Redirect 55

Frank Jaegeler:
Direct 56
Cross 64
Redirect 69
Recross 71

Ilse Hammerstein:
Direct 74
Cross 95
Redirect 105

PAGE

Harold Kraus:
Direct 127

DEFENDANT'S WITNESS

Ilse Hammersteir:
Direct 164

GOVERNMENT'S EXHIBITS

	Admitted Page	Printed Page
1—Grand Jury Subpoena Duces Tecum	18	183
2—Grand Jury Subpoena Duces Tecum	18	186
3—Testimony of Lawrence Johnson taken May 14, 1957	40	188
4—Testimony of Lawrence Johnson taken May 4, 1957	40	190
6—Certificate of Dissolution	48	195
Unnumbered—Receipt for books delivered pursuant to subpoena	—	197

(A)

Docket Entries

Crim. No. C 153-38

THE UNITED STATES

vs.

LAWRENCE JOHNSON

VIOLATION
Contempt of Court.

Failure to ~~produce books~~ pursuant to a subpoena of May 1957 Grand Jury.

DATE	PROCEEDINGS
	Before: WALSH, J. Witness brought before Court on May 14, 1957 after refusal to produce books pursuant to subpoena. On May 15, 1957 ~~witness~~ directed to produce records. On May 17, 1957 witness refuses to produce books.
5-21-57	Hearing concluded. Witness adjudged in contempt of Court. Sentenced to Sixty Days with condition that the Court will rescind sentence if books are produced by May 27, 1957 at 2 PM or good faith effort is made to produce them. Defendant released in custody of his attorney Mr. Kleinman, until 5-27-57 at 2 PM. WALSH, J.
5-27-57	On application of Mr. Kleinman, Atty for deft. matter is re-opened. Sentence imposed on 5-21-57 to stand. Defendant released in custody of his atty. Mr. Kleinman, pending appeal, provided said appeal is perfected by June 6, 1957. WALSH, J.

DATE	PROCEEDINGS
(B)	
5-28-57	Filed Judgment—Sentenced to 60 days unless he shall purge himself of such contempt by producing aforesaid books and records before this Court on or before May 27, 1957 or is otherwise discharged according to law. WALSH, J.
5-28-57	Issued certified copies of judgment to U S marshal as commitment.

Testimony

(1) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Before:

HON. LAWRENCE E. WALSH,

District Judge.

New York, May 10, 1957.

PAUL W. WILLIAMS, Esq.,
United States Attorney, for the Government;
By ROBERT W. BJORK, Esq.,
Assistant United States Attorney.

WILLIAM W. KLEINMAN, Esq.,
Attorney for the Witness;
SEYMOUR J. SHAPIRO, Esq., of Counsel.

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(2) The Clerk: The marshall will clear the courtroom.

(Courtroom cleared by marshals.)

Mr. Bjork: We have a matter which the grand jury would like to take up with the Court. The background of it, your Honor, is that the grand jury is investigating with respect to the alleged violation of Title 18, Section 1001; false statements.

Two grand jury subpoenas hav been issued requiring the production of the books and records of Brakes, Inc., of which the witness, Lawrence Johnson, is the president.

Mr. Johnson, through his attorney, Mr. William Kleinman, has produced certain books and records pursuant to two previous directions of the foreman of the grand jury. Mr. Johnson has produced one other batch of documents this morning relating to the correspondence of Brakes, Inc. with the Bureau of Inspection of the New York Ordnance Department.

He has, however, refused to answer questions with respect to the whereabout of any additional books and records which the Government seeks from this subpoena. He has stated that he has conducted some investigation; that the books and records which (3) he was able to find were turned over to Mr. Kleinman. There is a notation on the grand jury subpoena of the books and records which the Government has received.

It is with respect to the refusal to answer questions as to the whereabouts of the other books that we seek your aid.

At this time I would like to call the stenographer and read into the record the testimony of the witness with respect to these books and records.

Mr. Shapiro: If your Honor please, may I respectfully ask that this matter be held for a few minutes. Mr. Kleinman is not available this morning. I am associate counsel with him. I think he should be here for this purpose.

It is also my understanding that Mr. Johnson has testified that all of the books and records which he could find on the original subpoena that was served in November, 1955, were delivered to his attorney, Mr. Kleinman, and Mr. Kleinman delivered them to the United States Attorney, Mr. Hallinan at that time. He said that he could find no further books and records after a search this morning. He said that he had instructed, I understand this from his testimony, the girls in the office to look for the records. The only other records (4) that he could

come up with were some copies of letters that were delivered this morning. He has no other records.

As to the statement of the district attorney that Mr. Johnson is the president, that is not quite the fact. The corporation is dissolved and there is no president today.

Mr. Bjork: At the time the corporation was dissolved, the certificate of dissolution shows Lawrence Johnson was president and sole stockholder of Brakes, Inc.

Mr. Shapiro: During the life of the corporation he was, your Honor.

Mr. Bjork: I should like to call the Court's attention to the decision of the Court of Appeals in United States v. Curcio, reported at 234 Fed. 2d., 470, where a very similar question came up with respect to additional books and records and as to the whereabouts of those books and records, where Judge Medina stated that the Fifth Amendment provides no protection to a corporate official who refuses to answer what he has done with additional books and records. He stated that his requirement to produce would be no more than an empty and meaningless form of words, to hand over (5) possession to another and then refuse to say when and where he had last seen them, on the ground that anything on the subject might tend to incriminate him.

Mr. Shapiro: If your Honor please, that case has no application here whatsoever, because that is not the situation. Mr. Johnson does not say that he gave them to somebody and will not say where or it is who has them. He has testified, and if he has not I will so instruct him to testify, as to whether or not he knows of the existence of any other books or records, because I know there is no trouble as to the existence of the books, the corporate books.

The Court: I do not understand where you are in conflict. Has he answered your questions with respect to the whereabouts of these records?

Mr. Bjork: He has given conflicting testimony, your Honor. He stated initially that all books and records he could find were turned over to the United States Government. However, when asked specific questions, with respect to the whereabouts—

The Court: Let me listen to the testimony and it may clear this thing up. Let's have the (6) testimony.

EMILY J. CORDES, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Bjork:

Q. Miss Cordes, what is your occupation? A. Grand jury reporter.

Q. In the course of your duties on May 10, 1957, did you transcribe the testimony before the grand jury of the witness Lawrence Johnson? A. I took it down but didn't transcribe it.

Q. From your stenographic minutes would you tell the Court and the grand jury what was said at that time. A. I did not take it from the very beginning.

The Court: You replaced another reporter?
The Witness: Yes.
The Court: All right, go ahead.

(7) A. (Reading)

"Q. And those are the only books and records you were able to find? A. That's all I could find.

"Q. Did you go through the file room? A. I went all through the file room.

"Q. Was there any evidence of fire or water damage

to any of the documents which you found in that room? A. I respectfully decline to answer that, sir, upon the ground that my answer might tend to incriminate me.

"Mr. Bjork: Mr. Foreman, would you direct the witness to answer that question.

"Foreman: You are hereby directed to answer the question of the district attorney.

"Witness: I respectfully decline to answer it, sir, upon the same grounds.

"Foreman: What grounds?

"Witness: On the ground that my answer may tend to incriminate me.

"Q. Mr. Johnson, do you believe that a truthful answer to the question would involve you in a federal criminal prosecution? A. I respectfully decline to answer that, sir, upon the same ground.

"Mr. Bjork: Will you direct the witness to (8) answer.

"Foreman: You are again, sir, directed to answer that question.

"Witness: I respectfully decline to answer it, sir, upon the advice of counsel that my answer might tend to incriminate me.

"Q. Mr. Johnson, the two ladies to whom you refer, did they find the documents which you've produced here this morning? A. I told you that I was there at six o'clock this morning and most certainly they wouldn't be there at that hour.

"Q. You need only answer answer my question, sir. A. The answer is no.

"Q. Mr. Johnson, have you at any times destroyed any of the books and records called for by Grand Jury Exhibit 11? A. Upon advice of counsel I respectfully decline to answer that, sir, upon the same grounds, that my answer might tend to incriminate me.

"Mr. Bjork: Would you direct the witness to answer.

"Foreman: You are so directed to answer the question.

(9) "Witness: I respectfully decline to answer upon the same grounds.

"Q. Mr. Johnson, have you ever seen any copies of Government contracts entered into by Brakes, Inc., with the United States Government? A. I decline to answer that, sir, upon the same grounds that my answer might tend to incriminate me.

"Mr. Bjork: Would you direct the witness to answer that question.

"Foreman: You are directed to answer the question to the district attorney.

"Witness: I respectfully decline to answer, sir, upon the same grounds.

"Q. Mr. Johnson, do you believe that a truthful answer to that question might involve you in a federal criminal prosecution? A. I respectfully decline to answer.

"Foreman: You are directed to answer.

"Witness: I respectfully decline to answer sir, upon the same grounds, that my answer might tend to incriminate me.

"Q. Mr. Johnson, do I understand you to say now that all the books and records which you have been able to find, called for in the subpoenas marked as Grand (10) Jury Exhibits 11 and 12, have either been produced here this morning or have been turned over to your attorney, Mr. William Kleinman? A. I respectfully decline to answer that, sir, upon the same grounds.

"Foreman: You are directed to answer the question.

"Witness: Sir, I respectfully decline to answer upon the advice of counsel, upon the same grounds that my answer might tend to incrriminate me.

"Mr. Johnson, do you know whether or not there are any other documents called for in those two subpoenas in your possession which you have not produced here this morn-

ing? A. I decline to answer that, sir, upon the same grounds that my answer might tend to incriminate me.

"Foreman: You are directed to answer the question.

"Witness: I decline, sir, upon the same grounds.

"Q. Mr. Johnson, do you know whether or not at any time there has been a fire in the plant of Brakes, Inc., in which any of the documents called for in Grand Jury Exhibits 11 and 12 were destroyed? (11) A. On the advice of counsel, sir, I decline to answer that upon the same ground that my answer may tend to incriminate me.

"Foreman: You are directed to answer it.

"Witness: I respectfully decline, sir, upon the same grounds.

"Q. Mr. Johnson, have you ever seen any records of sales and purchase invoices with reference to Government contracts maintained by Brakes, Inc.? A. I decline to answer that, sir, upon the advice of counsel, for the same—

"Foreman: You are directed to answer.

"A. —for the same grounds. I respectfully decline to answer, sir, upon the same grounds.

"Foreman: Even under direction from the Grand Jury?

"Witness: Even under direction from the Grand Jury, yes, sir.

"Mr. Johnson, would you refuse to answer any other questions with respect to the whereabouts of the books and records which are called for in Grand Jury Exhibits 11 and 12? A. I'm under advice of counsel, sir, and that's my instructions, to respectfully decline to answer.

(12) "Q. Do you, yourself, believe that a truthful answer to those questions would involve you in a federal criminal prosecution? A. I respectfully decline to answer, sir, upon the same grounds.

"Foreman: Again you are directed to answer this additional question.

"Witness: Sir, under the advice of counsel I respectfully decline to answer, sir, upon the same grounds.

Testimony of Lawrence Johnson Before Grand Jury Read Into Record

"Q. Mr. Johnson, I'm going to ask you to remain in the witness room at this time, and I want to advise you that the Government intends to seek the aid of the United States District Court to compel you to answer those questions, and for violation of which you may be held in contempt. A contempt sanction might cause you to go to jail summarily. Do you understand that, sir? A. Yes.

"Q. In spite of that, you refuse to answer the questions which were put to you? A. Yes, sir.

"Mr. Bjork: That will be all at this time. If you will remain in the witness room.

"(Witness leaves room.)

"(Grand Jury adjourns to Courtroom 318.)"

(13) The Court: Isn't there an area here in which you would ask him to answer?

Mr. Shapiro: If your Honor please, while I would say that there are some specific objections that he took which might not be well founded, I will concede that, nevertheless, in the main, if you hear the entire context of the testimony I think Mr. Johnson has testified on more than one occasion that all of the books and records that he has under his control or any possession of have been produced or delivered to his attorney. I think he testified—we do not have these minutes here—on a previous occasion that they were brought to Mr. Kleinman in 1955 and that Mr. Kleinman delivered them to Mr. Hallinan. I think the United States Attorney would have correspondence on that that the papers were delivered.

I think in the main he has testified that whatever books and records there are have been delivered and he has no other books and records.

The Court: Wouldn't you agree that the district attorney can then probe with respect to specific

books? In other words, he can take the subpoena and go down the list and ask him whether that record is in existence, or he knows whether it is in existence, (14) and if so where it is. And then we have to carry it from there. Some of the questions which on the other hand that he might have been trying to develop, the witness was afraid that from some personal knowledge of some earlier area is an area as to which he could claim his privilege. In other words, it is not too easy a line to draw. But I think that with good faith on both sides we can draw.

Mr. Shapiro: I agree 100 per cent with what your Honor has said; with respect to those specific books, if he has any knowledge of the existence or the whereabouts—

The Court: And he can probe to find out when he last saw them, for example.

Mr. Shapiro: Yes.

The Court: That he has not got them now; did he have them last week?

Mr. Shapiro: Correct.

The Court: He could ask him that, couldn't he; did he have them at the time of the dissolution of the corporation.

Mr. Shapiro: Agreed.

The Court: Or where they were distributed at the time of the dissolution. I think that area (15) we would agree he could cover. Why don't you go ahead, and then if you have any more trouble, you can come down.

Mr. Bjork: I would just like to make one short statement for the record. This is the third occasion on which Mr. Johnson has been before the grand jury.

The Court: That is all right.

Mr. Bjork: He has endeavored to limit our investigation as to the whereabouts of these books. On previous occasions the Government was advised that all books and records other than those submitted, which were five volumes, were destroyed in a fire.

I respectfully request the Court's direction as to questions involving the destruction of those documents is a fair and proper area of inquiry.

Mr. Shapiro: I do not think that the question is a fair and proper area of inquiry.

Mr. Bjork: Is that information from Mr. Kleinman?

The Court: Once you get off into whys and wherefores you are getting into difficulties. I will see how far you can go along the other lines first. You may go back.

Mr. Bjork: Thank you.

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(16) New York, May 14, 1957.

Present:

Mr. Bjork,
Mr. Shapiro.

Mr. Shapiro: I called Mr. Kleinman. He was engaged this morning in court on a sentence and he cannot be here this morning. Would it be possible to pass it until this afternoon. He has appeared previously. I think this is the fourth time we are here. Mr. Kleinman has appeared previously.

The Court: Mr. Kleinman, knew this man was coming here this morning.

Mr. Shapiro: He did, but he had this engagement.

The Court: He knew the problems that we were having. I just cannot ask the grand jury to come back this afternoon to meet his convenience, as much as I would like to. I know how busy he is.

I think under the circumstances we will go ahead. Let's see what develops anyhow.

Mr. Bjork: Miss Cordes.

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(17) EMILY J. CORDES, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Bjork:

Q. Miss Cordes, you are a stenographer to the grand jury, are you not?

The Court: This is a continuation of her previous testimony.

A. Yes.

Q. Would you read to the Court from the minutes taken of Mr. Johnston's testimony this morning those questions relating to the production of documents? A. (Reading)

"LAWRENCE JOHNSON, recalled as a witness, having been previously duly sworn by the Foreman, testified as follows:

"*By Mr. Bjork:*

"Q. You're still under oath, sir. You realize that the oath administered to you is still in effect? A. Yes, sir.

Testimony of Lawrence Johnson Before Grand Jury Read Into Record

"Q. Would you state your name for the record. A. Lawrence Johnson.

"Q. Mr. Johnson, since your last appearance before the Grand Jury have you been able to discover any (18) additional documents other than those which you produced on Friday? A. Mrs. Hammerstein gave me some documents this morning, sir, that I produced this morning.

"Q. Those are the documents which were in the possession of Mr. Shapiro and are now outside the Grand Jury room and have been itemized by Mr. Scuderi and Mr. Shapiro? A. Yes, sir.

"Q. Mr. Shapiro is an associated attorney with Mr. Kleinman, your counsel? A. Yes, sir.

"Q. Now, Mr. Johnson, where were these books and records discovered? A. Mrs. Hammerstein discovered them on the second floor of the front of the Queens Boulevard part of the property.

"Q. Did you make any further search yourself of the area in which these books and records were found? A. No, sir, I did not.

"Q. Mr. Johnson, have you ever seen any Government contracts entered into by Brakes, Inc., and the United States Government? A. Oh, I must have.

(19) "Q. Do you recall when the last time was that you saw any contract with the United States Government? A. No, I wouldn't recall that, sir.

"Q. Was it subsequent to the time that you gave a deposition in a suit by Bendix Westinghouse against Brakes, Inc.? A. I wouldn't remember that, sir.

"Q. Mr. Johnson, I want to warn you that you are under oath, for violation of which you may be prosecuted for perjury, and an answer that you don't remember or you don't recall is not a sufficient answer unless, in fact, that is your honest belief at the time. It is no excuse to refuse

to answer because you say that you don't remember. A. When you're speaking of Government contracts, sir, are you speaking of Government contracts relating to Brakes, Inc.?

"Q. I am, sir. A. Well, I wouldn't remember when I saw the last one, sir.

"Q. Do you remember? A. I remember seeing some but I don't remember when.

"Q. Was it prior to the time that Brakes, Inc. was (20) dissolved? A. Oh, it certainly would have been prior.

"Q. Have you seen any of them since Brakes, Inc. was dissolved? A. I don't remember seeing any since then.

"Q. Do you remember where the contracts were when you last saw them, or a contract was when you last saw it? A. No, I couldn't recall that, sir.

"Q. Was it in the building on Queens Boulevard? A. I wouldn't recall that, sir.

"Q. Do you recall where the Government contracts were kept at the time Mr. Joseph Wittman was in your employ? A. I believe they were kept at 535 West 35th Street at the time.

"Q. And if Mrs. Hammerstein testified that at that time the books and records relating to Government contracts were maintained at the Queens Boulevard plant, you would say she was in error? A. If she said that they were kept at Queens Boulevard at that particular time, sir, I would almost be certain that she was in error, but, by the same token, maybe some of them were there.

(21) "Q. And if Mr. Wittman so testified, you would say that he was in error as well? A. You see, I didn't handle them. Mr. Wittman handled them at the time that Mr. Wittman was there, and the office was in New York, and I couldn't really give you an answer and know honestly whether they might have been, whether they were in Long Island City or New York.

Testimony of Lawrence Johnson Before Grand Jury Read Into Record

"Q. Subsequent to the time Mr. Wittman left—which, I understand, was in September of 1952—who was in charge of production on Government contracts? A. Mr. Wittman, sir.

"Q. Subsequent to his departure from Brakes, Inc., who handled the Government contracts? The billings, the certificates of compliance and also negotiations on Government contracts? A. Could have been very possible that I did, sir.

"Q. Do you recall whether or not you did, sir? A. Not—my memory would have to be refreshed, but I couldn't recall.

"Q. Mr. Johnson, I show you a series of documents which are marked as Grand Jury Exhibit 9, purporting to be certificates of compliance and analysis submitted by Brakes, Inc. to the United States Government at 180 (22) Varick Street, New York City, bearing a signature (Lawrence Johnson,' and ask you whether that refreshes your recollection whether or not you've ever seen any of those records. A. I respectfully decline to answer, sir, on the gound that my answer might tend to incriminate me.

"Q. Mr. Johnson, you just stated a moment ago that if you could refresh your recollection, you would be able to answer. Does that document refresh your recollection? A. I respectfully decline to answer, sir.

"Q. Mr. Johnson, do you believe that a truthful answer to that question would involve you in a federal criminal prosecution? A. I still respectfully decline to answer, sir, upon the same grounds.

"Q. Would you direct the witness—

"Foreman: You are directed to answer.

"Witness: I respectfully decline to answer, sir, upon the same grounds.

"Q. Mr. Johnson, you realize that Government's Exhibit 11-A, the subpoena served upon you on May 3rd,

1957, calls for the production of certificates of compliance and analysis dealing with the Government contracts (23) enumerated in that subpoena. Do you understand that, sir? A. Yes, sir.

"Q. And you, nevertheless, refuse to answer whether or not you've ever seen those documents before? A. I don't quite follow your question, sir.

"Q. I'll rephrase it. In spite of the fact that one of the items called for in the subpoena relates to certificates of compliance and analysis, you, nevertheless, refuse to answer whether or not Grand Jury's Exhibit 9 refreshes your recollection with respect to your having seen them prior to today? A. I'm under the advice of counsel, sir, and I respectfully decline to answer, sir.

"Q. Mr. Johnson, I show you Grand Jury Exhibit 5, a certified photostatic copy of a contract between Brakes, Inc., and the Department of the Army Ordnance Corps, Ordnance Tank Automotive Center in Detroit, Michigan, and ask you whether you have ever seen that or a copy, either original or a carbon copy, of that document at the plant of Queens Boulevard. A. I respectfully decline to answer, sir, upon the same ground that my answer might tend to incriminate me.

(24) "Q. You realize that the Government subpoena marked as Grand Jury Exhibits 11A and 12 call for the production of any copies of that contract which are in the possession of Brakes, Inc. A. I decline to answer, sir, upon the same ground.

"Mr. Bjork: Would you—

"Foreman: You are directed to answer.

"Witness: I respectfully decline to answer, sir, upon the grounds that my answer may tend to incriminate me.

"Q. Mr. Johnson, do you know whether or not the Brakes, Inc. maintained records of their purchases in connection with the Government contracts referred to in Grand

Jury Exhibit 11? A. I decline to answer, sir, upon the same ground, that my answer may tend to incriminate me.

"Mr. Bjork: Would you instruct—

"Foreman: You are so directed to answer the question.

"Witness: I respectfully decline to answer, sir, upon the same ground.

"Q. Mr. Johnson, would you care to discuss this with your attorney prior to going to the Court for a (25) direction? A. If you think I should.

"Q. I am not advising you in any way, sir, other than that you are required to tell the truth. A. I'm trying to do that, sir.

"Q. You may be excused at this time; if you will kindly wait in the witness room. A. Yes, sir.

"(Witness leaves room.)

"(Session adjourned to Courtroom 318.)"

(26) Mr. Shapiro: Now, if your Honor please, at the outset I think I should move to quash the subpoena on the ground that Mr. Johnson is being examined as an officer of a defunct corporation. The corporation is dead, and therefore he cannot be examined as an officer.

I respectfully submit that the only thing that remains now is to examine him as an individual. So far as this examination is concerned, I think he has the absolute right to plead privilege right through.

May I ask that the subpoena be quashed at this time?

Mr. Bjork: I think the subpoena, two subpoenas, your Honor, with Mr. Shapiro's permission, might be marked as Government's Exhibits 1 and 2 on this hearing.

(Marked Government's Exhibits 1 and 2.)

Mr. Bjork: I might also add that while I cannot quote you the section of the New York State Corporation Law which is involved, it is my belief that there is a provision in the New York State Corporation law that when a corporation is dissolved its officers and directors remain in power and remain functioning officers of the corporation for at least a period of two (27) years.

According to my information the corporation was not dissolved until February, 1955, and therefore Mr. Johnson still is the legal possessor of any books and records which are in existence of Brakes, Inc., and the Government has the absolute right under many decisions of the Supreme Court to examine into the whereabouts and the possible existence of corporate books and records. It is no basis for refusing to answer that the contents of those records might involve that corporate officer or sole stockholder of the corporation.

The Court: You say the state statute requires the continued availability of those records?

Mr. Bjork: I am quite sure it does.

The Court: On that, I would like to have a memorandum to clarify that, and I will be glad to have one from you, too, Mr. Shapiro.

Mr. Shapiro: Yes, your Honor.

The Court: Assuming, for the sake of argument, that I decide that point in favor of the Government; in other words, that this is still an examination of the corporate records, not personal records.

(28) Mr. Shapiro: Then I would like to proceed with the balance of the argument.

The Court: All right, let's go ahead.

Mr. Shapiro: With respect to one of the questions that I heard here, I do not think Mr. Johnson, assuming you overrule my objection, has the right to

plead privilege. With respect to the balance, I think he does.

The Court: Which one?

Mr. Shapiro: There was one particular question—

The Court: Where he had seen the contract, Exhibit 5, I think it was shown.

Mr. Shapiro: I do not think that the Government has the right to ask him or the district attorney the right to ask Mr. Johnson to identify any contracts in existence, in view of the testimony on the basis of the few questions that were asked here this morning. Mr. Johnson has been here four times. I think in the main he has testified that he has produced all of the books and records, that he delivered them to his attorney, that his attorney delivered them to the U. S. Attorney's office. The bookkeeper was examined before the grand jury, and (29) Mr. Bjork told Mr. Johnson that there were some other records. Mr. Johnson asked the bookkeeper to look for the records and produce them, and he brought in a volume of records this morning. He states he knows of no other records. I think the Government has an absolute right to find out where the records are, and inasmuch as the testimony has already been established that all of the books and records were produced and that he has no other books and records, I respectfully submit that that should terminate it. With respect to the identification of Government contracts, as an officer of the corporation or Mr. Johnson, I take it that his claim of privilege should be respected here. He is in a difficult position. He is a proposed defendant in the case. He is strictly under cross examination and no opportunity to be represented by

counsel. I think his claim of privilege is meritorious.

The Court: Let's go along as to it being asserted in good faith. The question is whether it is technically proper or not.

Would you agree with me that if I decide in favor of the Government on the first proposition, that he could be asked further if these books are in (30) his possession, if these records are in his possession, even though has already been asked?

Mr. Shapiro: Yes.

The Court: Second, has he given them to anybody else?

Third, does he have any knowledge of their present whereabouts?

Mr. Shapiro: Yes, your Honor, no objection to those questions.

The Court: Mr. Bjork, how much further than that do you want to go?

Mr. Bjork: I think the Government is entitled to know whether or not these books and records were ever in the possession of Mr. Johnson, and that is the first step to ascertaining whether or not truthful answers are being given with respect to the existence.

The Court: Mr. Shapiro, you agree with the Government as to that part, as to whether he ever had them in his possession?

Mr. Shapiro: Whether he ever had the books and records in his possession?

The Court: Yes.

Mr. Shapiro: I can see no objection to that.

(31) Mr. Bjork: We also believe—

Mr. Shapiro: One thing, with regard to whether the books and records were in his possession, I think we should restrict that so that it should not be ap-

plied to any signature bearing his signature or bearing his name.

The Court: In other words, you are not asking for any admissions as to signatures? The genuineness of the documents?

Mr. Bjork: No. The question was phrased and he said that he could not refresh his recollection.

The Court: You tried to refresh his recollection on it. I think, in other words, that you can show him the documents, but I do not think you can question him about them. If they refresh his recollection from the sight of them, fine. If they don't and he still does not remember, there is a limit as to how far you can examine in that regard. If he has ever had them, if he has given them to anybody else, and if he has any knowledge as to their present whereabouts seem to me proper, a proper field to cover.

Mr. Shapiro: No objection to that.

The Court: No objection to that.

Mr. Shapiro: That is right.

(32) The Court: The thing we have got to be careful to avoid is getting into the question if he ever did anything other than give them to somebody else, because there you would likely be drawing forth admissions which he might feel would incriminate him.

Mr. Bjork: There we come to the question of good faith.

On two separate occasions we have received answers; one, I do not know where they are, have never seen them, and then when pressed as to refreshing his recollection he claimed the Fifth Amendment. I do not want to get into the argument of possible incrimination.

The Court: Here it is as I see it: Assume a state of facts that he destroyed the records, I do not think it is proper to question him as to the destruction, or whether he had them destroyed or that he knows that somebody else destroyed them. There I can see the problem the defendant has, that he would have at a trial.

Mr. Shapiro: Yes.

The Court: And I can see the problem that the witness has who is wary as to where this investigation leads.

So it seems to me that the field that I have (33) outlined as to which the witness' counsel agrees, will give you an opportunity to find out whether he ever had them in his possession, whether he gave them to anybody else, or that he has any knowledge as to their present whereabouts, and that is about as far as you can go.

Mr. Shapiro: This is restricted as to books not in the possession of the Government today.

The Court: That is correct.

Mr. Shapiro: He cannot ask whether he—

The Court: Now on that Mr. Bjork I think in good faith was simply trying to refresh his recollection. The ultimate question as to the books not in the record—

Mr. Shapiro: As to the good faith of Mr. Johnson, I should tell your Honor that this was the largest brake establishment. They had sixty or seventy employees and four branches, and they had a bookkeeping staff and office staff of about five employees, and I do not know that he would look at every paper.

Mr. Bjork: There is one matter which I want to make clear as to the Government's position. We

have received testimony that the books reflect in (34) production that the Government contracts were maintained on copies of Government contracts and on copies of certificates of compliance; that these were books and records maintained by Brakes, Inc., in the ordinary course of business. But we do have the copies that were submitted to the United States Government, but I want it made clear to Mr. Shapiro and the Court that the Government feels that we are entitled to obtain by subpoena duces tecum the other documents.

The Court: He includes records. All Mr. Shapiro doesn't want you to do is to ask him questions about records you already have.

Mr. Bjork: I think he is referring to certificates of compliance.

The Court: You have no objection to their probing—

Mr. Shapiro: To papers that the Government does not have?

The Court: Yes.

Mr. Shapiro: No, I think he has a right to find out.

Mr. Bjork: May I be absolutely clear. Is it the statement of Mr. Shapiro that we may examine into any copies of Government records which we now have (35) in our possession which may be maintained by Brakes, Inc.?

Mr. Shapiro: You can ask him whether he has any copies of those particular records or whether he has ever seen them.

The Court: And as to their present whereabouts and if he ever gave them to anybody.

I think you can go ahead and see how far you can get. I will send you back to your work.

(36) New York, May 15, 1957

Present:

Mr. Bjork,
Mr. Kleinman.

Mr. Bjork: If the Court please, I would first like to call your attention to Sections 105 and 106 of the New York Stock Corporation Law. 105, Subsection 8, provides that where a corporation voluntarily dissolves, that the corporation shall continue to exist for the doing of all actions required to wind up its business affairs, and it may sue and be sued in the corporate name.

Section 106, subsection 5, which was just recently passed, provides that the Supreme Court of the State of New York maintains jurisdiction to aid in the winding up of the affairs of the corporation, and that a creditor or stockholder, or in appropriate cases, the Attorney General of the State may move the Court for an order relating to the destruction of records, documents and correspondence of the corporation.

In view of these two sections, it is the (37) Government's position that the directors of the corporation are the appropriate persons to whom the subpoena duces tecum may be addressed, and particularly in view of subsection 5 of 106, that since the Court maintains jurisdiction, to order that they be destroyed, that until such an order is entered, that it is the duty of the officers to maintain—

The Court: Let me see that section.

Mr. Bjork: I wrote it out. I don't know if you can read it.

Mr. Kleinman: I have the book here, if you would care to look at it.

The Court: That is fine. There is nothing like seeing the book itself.

Mr. Kleinman: Your Honor will notice that there have been amendments, and in the latter portion of the book I have put bookmarks in there. It is 105 and 106.

The Court: Thank you.

Mr. Kleinman: May I state, your Honor, that it may be of some assistance to the Court without reading that very long section which is before you now, to know that there have been adjudications of Section 105, not 106, which is new, and which I do not believe (38) applies to this case at all, by the Supreme Court of the United States and the various Circuit Courts throughout the country, and I am preparing a memorandum—I started in on it as soon as I heard about this situation sometime late yesterday afternoon—and perhaps by this time most of it has already been typewritten. When I left the office about three-quarters of an hour ago it was in the process of being typewritten. Before the end of the day I think I will have the memorandum to submit to your Honor, which may be of some help.

May I say this, your Honor. In connection with the general problem which now confronts the Court that the doctrine of abatement with respect to corporations is the federal doctrine and the common law doctrine of abatement is, of course, a very simple one, as your Honor knows, and that is that after the dissolution of a corporation it ceases to exist; that no actions can be brought against it; that it cannot function except as the common law rule may be abrogated by the state law of the state from which it gained life. So reference is made to the

section or sections now before your Honor, but an interpretation of that section with respect to criminal proceedings, very briefly, is this, your Honor: (I shall have the cases and citations (39) in this memorandum) No criminal action may lie against a dissolved corporation.

Beginning with that premise, it becomes very doubtful whether an officer or a director of a dissolved corporation should be required to testify to any more than facts concerning the dissolution, or during the life of the corporation, whether or not there were books and where the books are.

There is not dispute in this case, your Honor, that we are not attempting to produce books. As a matter of fact, our position, very simply, is this: That we have produced all of the books and records of this defunct corporation which we could find, which were in our possession at any time since the service of the original subpoena, which goes back to 1955.

Now the United States Attorney apparently is not pleased with the amount of documentary matters which he has received under that subpoena duces tecum. He has been questioning Mr. Johnson, as well as others who were employed by the corporation, or who may have been officers of the corporation, on the existence of books, documents, records, et cetera.

I myself, not personally, but through my office, made a delivery of all the books and records (40) and documents which were left at my office in the latter part of 1955, which were physically delivered to the United States Attorney in charge of this case in January of 1956.

I have been questioned about that this morning

before the Grand Jury, and that is the gist of my testimony before the Grand Jury.

Whatever was there in a package or packages were delivered; a receipt was given, the original of which I turned over to Mr. Bjork. That has been introduced as an exhibit before this Grand Jury.

Since that time, when these present matters were being investigated by the Grand Jury, Mr. Bjork has been asking me whether or not there are others and he was directed to search for others.

Mr. Bjork: I trust you mean Mr. Johnson.

Mr. Kleinman: I am very sorry. I misspoke. I meant Mr. Johnson.

There has been a production, as I understand, of some additional books or records. I am not too familiar with that, but I believe there was something produced as the result of the search made by some of the employees of Mr. Johnson.

Now, as I stated, in a word, this is our (41) position: We are not attempting to withhold any books or records or documents. We have produced everything we have at the present time which could be attributed to this corporation.

The more serious problem in this case is the one which your Honor looked into yesterday, and that was whether or not Mr. Johnson could claim his privilege with respect to a great many questions which were being put to him.

The Court: Mr. Kleinman, it makes the matter a lot simpler if we can go ahead upon the assumption that the Grand Jury has the power to compel the production of corporate documents, even of this dissolved corporation, through Mr. Johnson.

Mr. Kleinman: May I say this, your Honor: I do not know what the answer is with respect to the dissolved corporation. I do not agree with Mr.

Bjork's interpretation of Section 105 of the Stock Corporation law of the State of New York. However, I think the point is purely academic.

Assuming that there is the right to compel the production of the books and documents of a defunct or no-longer-existing corporation, I do not argue that point; I say that we have produced everything. That (42) makes that point moot. Whether or not we were required to keep these books for any length of time, I say is not applicable to the situation now before your Honor. I do not think we have to meet it at the present time.

My position is, as I have stated, that the corporation having been dissolved in April of 1955, it is a very fortunate thing that we have these books. Whether we were required to keep them or not, I do not think this Court is concerned with, but from the knowledge that I have of the case, I can state to the Court that it is my belief that everything that we have, or which Mr. Johnson had in the nature of books or records or documents of the corporation now have been produced before this Grand Jury.

The Court: You are not raising any objection to the subpoena on the ground of a dissolution of the corporation?

Mr. Kleinman: May I just say this, your Honor: I see from the minutes of what transpired yesterday before your Honor, which I have been looking through very hurriedly, within the last few minutes, that my colleague, Mr. Shapiro, made a motion in the nature to quash the subpoena. Perhaps Mr. Shapiro was right.

(43) The Court: That may well be. I just want to know whether we have to go into that to find out.

Mr. Kleinman: Not at the present time.

The Court: All right. We will go ahead, then.

Mr. Bjork: If your Honor please, I think I can withhold any comments about the argument that by dissolving a corporation, the corporation thereby becomes immune from criminal prosecution.

Be that as it may, the Government's position is that the witness, Lawrence Johnson, is in contempt for a failure to produce the books and records of the corporation or to submit a convincing explanation of their whereabouts, the fact that he was unable to produce these books and records.

He has testified that all the books and records which he could find were turned over to Mr. Kleinman. He has also testified that other books and records were maintained by the corporation, which are called for specifically by the subpoenas, which were marked yesterday as Government's Exhibits 11 and 12. He has failed to give any explanation whatsoever as to what has happened to those documents other than the evasive answer, "I do not know," or "I cannot remember," or "I don't remember," (44) "I don't know," "I did not keep the books. I had a bookkeeper."

It is the Government's position that a man cannot come before the Grand Jury, a man in whose custody the law places these books and records of the corporation, and then merely say, "I gave you what I have; I cannot find any more," at least as the Supreme Court has held in United States v. Bryan, that there has to be some modicum of good faith.

The Government submits that there has been no showing of the good faith required.

The Court: I have a clear picture. The only question now before me is the failure to produce the books. There is no longer any question of not answering questions?

Mr. Bjork: There is one question, sir, which remains open, and that deals with Mr. Johnson's refusal to answer whether or not he had seen the certificates of compliance or copies of them in the files of Brakes, Inc. at any time.

I think that under the Lopiparo case, which was called to your Honor's attention, that is before you, 216 Fed. 2d., page 87, that under the doctrine of that case, the form of which was proved by Nilva v. (45) United States, reported in 352 United States, that he has no right to take the Fifth Amendment, if you will, and refuse to answer that question. His refusal to answer that question upon the direction from the Court to do so, would be contempt. The Government respectfully requests that the witness be directed by this Court to answer that question.

Mr. Kleinman: May I be heard, your Honor?

The Court: Yes.

Mr. Kleinman: Your Honor, I believe that there is no area in which we can dispute the fact that an officer cannot refuse to produce books, papers and records.

I believe it has been held in United States v. White, 322 United States 694, that while he must produce the records, he cannot be compelled to testify concerning the records or any entries.

Now what Mr. Bjork is attempting to do is to do precisely that.

The Court: It is a difficult line to draw.

Mr. Kleinman: I appreciate that.

The Court: Mr. Bjork and your associate have been attempting to draw it together and have gotten along fairly well. There is only one question (46) which at the end of three days' testimony they have not come to an agreement on. I really do not think that it is worth our time to go into that question.

The more important question is whether there is an adequate explanation for the failure to produce the books. In other words, Mr. Bjork comes before me now and says that he is the president of this corporation, that he is the man charged with the custody of the books; we have asked for them and he won't produce them. Now he asks to have him cited for contempt. And that puts it up to the Court as to whether he wants to give any explanation as to his failure to produce.

Mr. Kleinman: Your Honor, I believe it was pointed out to you yesterday that this corporation was a fairly large one. In the volume of business that it did, it was perhaps the largest in its field. It employed—I am not sure about the figures—but I have been told approximately 60 people. I do not know how large the office or the administrative staff was, but I do know that there were several people working in the office, Miss Goldsmith, for example, and some others whose names I do not know.

Mr. Johnson was a fairly busy man, not only in Brakes, Inc., but in some other endeavors of his.

(47) I do not believe that it could be expected to have, let us say, the president of U. S. Steel testify as to whether or not these are the only books that they ever had and where were these books at the time they had them. Mr. Johnson, to a smaller degree, of course, finds himself in the same position.

The Court: Tell me about testimony now. We have served a subpoena on the president of the United States Steel Corporation asking that he produce books for a certain period of time. He comes in and says, "I cannot."

All right, it seems to me that if the president of

United States Steel said that to me, if Mr. Bjork said he had the power to compel him to do it, if there was not some peculiar charter arrangement which took it away from him, then I would say, "Well, now, it is up to you to explain this."

Mr. Kleinman: Then he would go to his employees and he would ask somebody to gather together all these books and records and documents, and he would produce them in court, just as we have done in this case.

Some of these employees have been questioned. Mr. Bjork has the advantage of me because I do not know their answers, but I am sure that he has made (48) every effort to find out from them where these books and records and documents were kept, under whose control; whether or not Mr. Johnson ever had actual and physical custody of them. These are the things which the Court would have to find out to determine whether Mr. Johnson is acting in good faith at the present time.

The Court: I think that is where we stand now. I think we are all in agreement, and the time has now come for the production of the facts on this issue, and I think it is time to go ahead now. We are ready to go ahead now.

Mr. Bjork: We are ready to go ahead.

Mr. Kleinman: I am prepared to go ahead.

The Court: All right. Do we need the Grand Jury kept here for this?

Mr. Bjork: I do not believe actually that we do. However, the state of law as to what it is in the cases to which I have referred, the Lopiparo case, and particularly, the examination was conducted in the presence of the Grand Jury.

The Court: All right. Go ahead.

Mr. Bjork: I will call Mr. Benson.

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(49) Louis Benson, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Bjork:

Q. Mr. Benson, will you state your name for the record. A. Louis Benson.

Q. What is your occupation? A. Grand Jury reporter.

Q. And were you so employed on Ma' 15, 1957? A. Yes, sir.

Q. And at that time did you record the testimony of a man before the Grand Jury, Lawrence Johnson? A. Yes, sir.

Q. Mr. Benson, would you give to the Court and to the Grand Jury the translation of the stenographic notes taken by you at that time with respect to the testimony of the witness referring to the whereabouts of the corporate records.

I ask you to start from the beginning, if you will.

The Court: Do you have the transcribe?

Mr. Bjork: We don't have a transcript prepared. I am asking Mr. Benson to testify from his stenographic (50) notes taken by him at the time.

The Court: How long is this testimony?

Mr. Bjork: It took about ten minutes. If your Honor would rather, we can have this transcribed.

The Court: No. I thought you were going through all of his testimony.

Mr. Bjork: Some of the testimony has been transcribed.

Testimony of Lawrence Johnson Before Grand Jury Read Into Record

The Court: All right, go ahead.

A. (Reading)

"LAWRENCE JOHNSON resumed.

"*By Mr. Bjork*:

"Q. Mr. Johnson, you are still under oath. A. Yes, sir.

"Q. And still here pursuant to the subpoena duces tecum. A. Yes, sir.

"Q. Mr. Johnson, I ask you whether or not Brakes, Inc. at any time maintained records reflecting their purchases. A. Oh, they must have.

"Q. Is it not a fact, sir, that it was the practice of Brakes, Inc. to keep records of their purchase invoices? (51) A. I would say they did.

"Q. Is it not a fact, sir, that purchase invoices were maintained with respect to the materials purchased which were supplied to the United States Government on the contracts designated in Grand Jury Exhibits 11-A and 12? A. I would say those records must have been kept.

"Q. Have you ever seen any such purchase invoices? A. Very possible; I could have.

"Q. Do you remember the last time you saw any such purchase invoices? A. No, I wouldn't remember that, sir.

"Q. Had you seen them in 1954? A. I wouldn't remember that, sir.

"Q. Do you remember where they were maintained, where they were kept and stored? A. You asked me a similar question yesterday, and last night I recollected that practically everything pertaining to any Army contracts were kept in Long Island City.

"Q. That's correct, sir. Now do you remember whether or not you had such books and records, the records of invoices of purchases in 1954, at the time that you gave a

deposition in the action brought by Bendix-Westinghouse (52) against Brakes, Inc.? A. I wouldn't remember that, sir.

"Q. I call your attention to a deposition given by you on March 31, 1954 in that action. At that time you were asked, 'Q. Do you have your invoices covering the sales? A. To everybody that we sell diaphragms?

"'Q. Yes. A. We would have to go through volumes and volumes of records.

"'Q. Do you have the invoices? A. No; they are in the office.

"'Q. By the office you mean this location on 35th Street? A. That is right.

"'Q. All of your invoices are there? A. Yes.

"'Q. How far back do your invoices go? A. At least six years.'

"Mr. Johnson, does that refresh your recollection as to whether or not you had those invoices in that case reflecting sales in March of 1954? A. When you refer to invoices of sales of diaphragms, is that a general question of sales of (53) diaphragms to anybody and everybody?

"Q. No, sir, it is not a general question. It is restricted to sales of diaphragms and purchases of diaphragms which were submitted to the United States Government. A. You didn't say that, sir, did you, in your question?

"Q. I am saying it now. A. You are saying now. I wouldn't remember.

"Q. The reading of that deposition does not refresh your recollection? A. No, sir, too much time has gone by. I can't remember.

"Q. You can't remember that, three years? A. No, sir.

"Q. Where did you store the records of purchases and sales in 1954? A. Is that a general question, sir?

"Q. With respect to Government contracts. A. I wouldn't know how to answer that question, sir; purchase

Testimony of Lawrence Johnson Before Grand Jury Read Into Record

and sales, they could have been divided between the 35th Street office and the Queens Boulevard office.

"Q. When were the records moved from the 35th (54) Street office to Queens, if they were moved? A. They were moved, sir, and when I say 1954, I am guessing a little bit.

"Q. Is that to the best of your recollection the time they were moved? A. That's right, sir.

"Q. Sometime around Labor Day? A. Gee, I wouldn't remember. In fact, I am not even too certain of the year.

"Q. In fact you recall they were moved from 35th Street to Queens Boulevard? A. That I am positive of.

"Q. I assume that since you are positive that they were moved that you saw them at that time, is that correct? A. No, sir. I did not see them at that time. They were loaded on a truck and a lot of men took them over. When I say a lot of men, three or four men took them over to Long Island City.

"Q. Do you know where they were stored in Long Island City? A. When you say where they were stored, I know some of them were stored in the basement. Now, I couldn't honestly say they were all stored there. (55) I wouldn't know that, sir.

"Q. Were there anyother places where they might have been stored? A. They might have been stored upstairs in the office, and some of them might have been stored up on the second floor. As I told you, Miss Hammerstein found some of the records on the second floor of the Queens Boulevard part.

"Q. Did you ever maintain any of the corporation records in your own home? A. Never, sir.

"Q. Did you ever remove any of them from the office yourself? A. No, sir; definitely not.

"Q. Did you maintain a file of the Government contracts entered into by Brakes, Inc. with the United States Government? A. Do you mean me personally, sir?

"Q. You or anybody in your corporation? A. Not to my knowledge.

"Q. Have you ever seen any of the Government contracts referred to in Grand Jury Exhibits 11 and 12? A. I must have seen some of the contracts at some time or other.

(56) "Q. When was the last time that you saw any of the contracts referred to in those exhibits? A. I wouldn't remember that, sir.

"Q. I show you Grand Jury Exhibit 5, and ask you whether you recall seeing that contract in the files of Brakes, Inc.? A. I never remembered seeing those.

"Q. To the best of your recollection at no time in the past have you ever seen the Government contract reflected by that photostatic copy, by that I mean, the original or a carbon copy or any other photostatic copy of that document? A. To the best of my knowledge and belief, sir, I don't ever remember having seen this, sir. You know there's always the possibility I might have, but certainly I couldn't remember it.

"Q. You are stating under oath, sir, that that is the best of your knowledge and belief at this time, that you have never seen that contract before? A. I never remember having seen it, sir. I again state, there's always a possibility I might have seen it but I certainly do not remember it. If I have seen it, I do not remember it, sir.

"Q. Mr. Johnson, yesterday I inquired with (57) respect to certificates of compliance and analysis. I ask you at this time whether or not Brakes, Inc. kept carbon copies of certificates of compliance submitted to the United States Government? A. I wouldn't remember, nor would I know whether they ever did or not, sir.

"Q. Have you ever seen in the files of Brakes, Inc. any certificates of compliance? A. I might have, sir.

"Q. Do you know whether or not you did, sir? A. I wouldn't remember, sir.

"Q. Would it refresh your recollection if I again show you Grand Jury Exhibit 9? A. I respectfully decline to answer this question, sir, upon the grounds my answer might tend to incriminate me.

"Q. You refuse to answer whether or not seeing that exhibit refreshes your recollection as to whether or not you have ever seen any carbon copies or other copies of these documents in the files of Brakes, Inc.? A. I wouldn't remember having seen any carbon copies, sir.

"Q. I ask you whether it refreshes your recollection, sir? (58) A. That doesn't refresh my recollection as to whether I ever saw any carbon copies.

"Q. Have you ever seen any copies, whether they are carbon or otherwise, of these documents or similar documents in the files of Brakes, Inc.? A. I don't remember it, sir. If I did I don't remember it.

"Q. Seeing these exhibits which I place before you again does not refresh your recollection as to whether or not you have ever seen them before? A. You are referring to this, sir?

"Q. I am referring to the documents now marked as Grand Jury Exhibit 9. A. Is this Grand Jury Exhibit 9?

"Q. That's correct. Witness indicates papers before him. A. I decline to answer the question, if it is referring to this, upon the same grounds?

"Q. Sir? A. I decline to answer the question, sir, upon the same grounds.

"Q. That will be all. I will ask you to go to room 318 of the United States District Court.

"(Witness excused)"

(59) (Discussion between counsel at the counsel table, off the record.)

Mr. Bjork: With the consent of Mr. Kleinman, I will ask that the testimony of Mr. Johnson given

May 14th, 1957, be marked as Government's Exhibit 3.

(Discussion between counsel at the counsel table, off the record.)

Mr. Kleinman: There is no objection.

(Marked Government's Exhibit 3.)

Mr. Bjork: It is stipulated and agreed that if the stenographer taking those minutes were called to testify, she would testify that that is a true copy of her stenographic notes and transcribed to the best of her ability.

Mr. Kleinman: It is so stipulated. But I may say that I haven't seen them yet.

Mr. Bjork: May I have this marked as Government's Exhibit 4.

The Court: Yes.

(Marked Government's Exhibit 4.)

Mr. Bjork: Government's Exhibit 4 is the stenographic report of the testimony given by Lawrence Johnson on May 7, 1957 before the Grand Jury. I offer it at this time.

(60) Mr. Kleinman: There is no objection.

The Court: All right.

Mr. Kleinman: I would like to see a copy some time.

The Court: Haven't you seen them yet?

Mr. Kleinman: No.

The Court: Do you want to look through them?

Mr. Kleinman: I would concede, of course, that if the stenographer were called, that the transcript

is an exact typewritten transcript of the stenographic notes.

The Court: All right.

Mr. Bjork: I will take it upon myself to supply Mr. Kleinman with a photostatic copy.

The Court: All right.

Mr. Bjork: The Government offers for the purpose of this hearing only Grand Jury Exhibit 9, the documents referred to in the testimony of Mr. Johnson. (Documents handed to Mr. Kleinman)

Mr. Kleinman: Thank you.

The Court: What is your pleasure with respect to this hearing? I have got other hearings scheduled beginning at 2:30.

(61) Mr. Bjork: Mr. Zinke has two questions on the same problem.

I would that it is the Government's request at this time that the witness Johnson be directed to produce the books and records called for in the subpoena. That would be in accordance with the procedure adopted by the Court that he be given a final opportunity under the direction of the Court to produce those books and records.

Mr. Kleinman: Your Honor, you have my assurance that I have spoken to my client, and this is all we have now. We haven't any more.

The Court: I will give Mr. Johnson the direction that Mr. Bjork asks. I will direct him to produce the records called for in the subpoena.

Now what follows:

Mr. Bjork: I think this should be marked as the Government's next exhibit in order. It is a document which Mr. Johnson was referring to when he said it did not refresh his recollection. That is Grand Jury Exhibit 9, which is now Exhibit 5.

(Marked Government's Exhibit 5.)

The Court: Any objection to this?

Mr. Kleinman: None at all. At some time I (62) would like to look at it.

The Court: What I am trying to do now is to get all of these things before us. We do not want to hold the Grand Jury up while you and I read them all.

Mr. Bjork: That will conclude the examination.

The Court: Do you think you have anything to add now, Mr. Kleinman?

Mr. Kleinman: I much prefer looking at these things and having an opportunity of seeing the minutes which were taken.

The Court: All right.

Mr. Kleinman: I could add but a little at the present time—

The Court: Don't tell me you are engaged?

Mr. Kleinman: If your Honor has in mind this afternoon, I am from four o'clock on. On the 20th of May, which is next Monday, I expect to be engaged in a rather long trial before Judge Herlands.

The Court: All right. Let us see what we can do at noon tomorrow. I think by then I can finish with my morning calendar. I will adjourn this until then.

Is the Grand Jury going to be meeting tomorrow?

(63) Mr. Bjork: Yes, sir. I do not believe it will be necessary to have the Grand Jury here at that time; the direction having been given by the Court in the presence of the Grand Jury, there is no requirement that they be here.

Mr. Kleinman: I believe your Honor has already so directed him once before.

The Court: All right, I will do it again.

We will adjourn then until noon, and if there is any delay, it will be unavoidable. Tomorrow afternoon I have a continuation of the Hudson & Manhattan hearing, so we are going to have trouble getting an extended period until Friday. If you can hold off on it for me, we will make the most of it then.

Mr. Kleinman: Thank you very much. It has been a pleasure to be before you. This is the first time in a long time.

(Adjourned to May 16, 1957 at 12 o'clock noon.)

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(64)

Before:

HON. LAWRENCE E. WALSH,

District Judge.

New York, May 16, 1957.

Appearances:

PAUL W. WILLIAMS, Esq., United States Attorney,
for the Government;
By Robert W. Bjork, Esq.,
Assistant United States Attorney.

WILLIAM W. KLEINMAN, Esq.,
Attorney for the Witness;
Seymour J. Shapiro, Esq., of Counsel.

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(65) The Court: Mr. Bjork, what do you want to do?

Mr. Bjork: I have one witness which I would like to be in a position to excuse. Calling him back again

is an inconvenience. I am at your disposal. I know you have a 2:30 hearing.

The Court: How long will it take?

Mr. Bjork: I do not think it should take more than 10 minutes.

The Court: I think that is long enough to make it too long.

Now you or somebody raised the question of notice. Maybe it is my law clerk. Is there anything needed on that, Mr. Kleinman?

Mr. Kleinman: Your Honor has had several hours of corporation subpoenas. I hate to burden you with my little problem here, but I have a small memorandum of law.

The Court: A memorandum is never a burden.

(Memorandum handed to the Court.)

Mr. Bjork: The question which was in my mind, your Honor, and I did not want it to be any problem at some later date with respect to compliance with the Federal Rules and with respect to the contempt (66) proceeding. But it is our position that Rule 42(b) was complied with yesterday at which time it was stated in open court by your Honor that the hearing was with respect to possible punishment of the witness Johnson for contempt for his failure to produce the books and records called for in the subpoenas which were marked as Government's Exhibits 1 and 2 on this hearing, and that it was with Mr. Kleinman's consent that we were going forward at that time. I did want to make sure that that statement was in the record and that there was no issue on it.

Mr. Kleinman: I am not sure. Mr. Bjork has been trying to get some concession from me which I did not make yesterday. I do not want him to make any assumptions along that line.

Your Honor will recall that while basically we have the problem of a dissolved corporation and whether it has any existence at all for the purpose of criminal prosecution. My colleague several days ago raised the point and moved to quash the subpoena. Your Honor seems to have held that in abeyance because as to those discussions I have read the minutes of those discussions. The question here, as I think your Honor has stated, were some three things which you thought (67) should be complied with, leaving aside for that time the problem of whether or not there could be any criminal prosecution against a dissolved corporation.

The Court: I think we went ahead by agreement.

Mr. Kleinman: I believe so, your Honor. Your Honor stated at page 29 of the transcript, your Honor put the question to Mr. Shapiro at that time: Would you agree with me that if I decide in favor of the Government on the first proposition, that he could be asked further if these records are in his possession, even though it has already been asked?

Mr. Shapiro said yes. Then your Honor stated: "Second, has he given them to anybody else. Third, does he have any knowledge of their present whereabouts?"

And Mr. Shapiro said, "Yes, your Honor, no objection to those questions."

I am perfectly willing to abide by Mr. Shapiro's acceptance of those questions at that time.

The Court: Yes.

Mr. Kleinman: And I thought we were here on that and that alone.

The Court: But there is no way around the other point?

(68) Mr. Kleinman: No.

The Court: I do not think that is what Mr. Bjork wanted. He just wants to be sure that you and your client were on notice that he is now proceeding with the criminal contempt.

Mr. Kleinman: We understand. I understood your Honor's direction to have him answer before the Grand Jury. That I understand.

Mr. Bjork: And that was the only thing with respect to Rule 42(b). I am addressing myself—

Mr. Kleinman: This is a contempt done in the presence of your Honor.

The Court: That is the theory upon which Mr. Bjork is proceeding.

Mr. Kleinman: I assume so.

The Court: Now that we have agreed what we are doing, what do we do next?

Mr. Bjork: We have got the problem of the Grand Jury.

The Court: I am very sorry, but this Hudson & Manhattan matter is a continued hearing. I was here until eight last night on the other thing.

I just do not see how it is worthwhile for me to bother you this afternoon. There may be a (69) chance that we will be through by 3:30 or 4. But I do not see simply holding you here during that period of time. I am afraid the only thing to do is to go over until tomorrow. I was in hope we would finish today by noon.

Mr. Kleinman: I have a specific engagement before Judge Abruzzio at 11 o'clock tomorrow. It probably won't be long.

The Court: I probably won't finish before 12 with the morning's work anyhow. Mr. Kleinman, do you see anything better to do than to start tomorrow?

Mr. Kleinman: Whatever your Honor says. If

you will give me about 40 minutes before Judge Abruzzio.

The Court: If you like, we can start at 1:30.

Mr. Kleinman: I will get here, if your Honor is free, perhaps by 12 o'clock. And if your Honor is free and Mr. Bjork is available we can take it up at that time.

The Court: I was just thinking of saving your client's time, too, and start at 1:30.

Mr. Bjork: There is one problem. The Government has one witness whom we have under subpoena and who works starting in the afternoon. I think it (69-A) would be far more convenient to start at 12 or as soon as you get through.

Mr. Kleinman: Perhaps by 12.

The Court: All right. We will set it down for 12 or whatever time you get here.

(Adjourned to May 17, 1957, at 12 noon.)

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(70) New York, May 17, 1957.

Before:

HON. LAWRENCE E. WALSH,

District Judge.

Present:

Robert W. Bjork, Esq.,
William W. Kleinman, Esq.

Mr. Bjork: May it please the Court, may the record show, that the attorney, Mr. Kleinman, for the witness Johnson, has been served with a copy of our

brief in opposition on the motion made yesterday.

At this time, your Honor, we would like to have marked a photostat of the certificate of dissolution of Brakes, Inc.

The Clerk: Any objection, Mr. Kleinman?

Mr. Kleinman: No objection—is that the one dated April 18, 1955?

Mr. Bjork: Mine is not dated.

(71) Mr. Kleinman: Well, I haven't seen it. May I see it for a moment, please?

(Handed to Mr. Kleinman by the clerk.)

Mr. Kleinman: I believe, your Honor, in order for the record to be complete, in addition to what Mr. Bjork has offered in evidence, I have before me a certificate with the seal of the State of New York on it, of the Secretary of State of the State of New York dissolving Brakes, Incorporated, dated April 18, 1955.

Mr. Bjork is aware of that and since this is the only one that I have, I think your Honor might accept our stipulation that that is the date of the final dissolution.

Mr. Bjork: The Government so stipulates, your Honor.

The Court: All right.

(Marked Government's Exhibit 6 in evidence.)

Mr. Bjork: At this time the Government calls Anthony Scudari.

(72) ANTHONY SCUDARI, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Bjork:

Q. Mr. Scudari, by whom are you employed? A. By the Federal Bureau of Investigation.

Q. And in what capacity? A. Special Agent, accountant.

Q. And do you hold a degree in accounting, sir? A. I do.

Q. From what school? A. From Long Island University and a master's degree from New York University.

Q. Mr. Scudari, in the course of your official duties have you caused an investigation to be made of the books and records of Brakes Incorporated, which were produced to the United States Government? A. I did.

Q. And would you tell the Court what books and records were produced and on what days? A.

Mr. Kleinman: May it please your Honor, I will object to this on the ground that it has no materiality to the issue now before your Honor. I do not know what Mr. Scudari may testify to, but we (73) are here charged with contempt of this court for failure to produce under a subpoena duces tecum. The testimony which has already been given to the Grand Jury is that these are the books and records and documents in response to that suboena. Now I don't know what Mr. Scudari could add to that.

The Court: I will overrule the objection. I will let him testify.

A. In referring to my notes in January of 1955 I inventoried the records in the office of Mr. Joseph Hallinan, Assistant United States Attorney of Brakes, Incorporated, and I found that included were cash disbursements journal

from June, 1952, to December, 1953; cash receipts journal from June 1, 1952, to December 31, 1953; general journal from January, 1947, to December, 1954; general ledger from January, 1952, to December, 1954; accounts receivable ledger cards, five in number, with dates from December, 1951, to January, 1954; a sales journal from January, 1950, to December of 1953.

I had occasion to inventory records in the possession of Mr. Robert Bjork, Assistant United States Attorney, of Brakes, Incorporated, which included a general ledger for the year 1951; a cash disbursements (74) journal—journals on the Clinton Trust Company from December, 1951, to May, 1952; a cash disbursements journal on the Bank of Manhattan from January, 1949, to November, 1949; a cash receipts journal from January, 1950, to December, 1952; a sales journal from January, 1954, to September, 1954; check book stubs on the First National City Bank, Bridge Plaza North, 29th Street, Long Island City, New York, numbered with check stub numbered 500, dated December 19, 1951, to check stub numbered 780, October 7, 1952; also contained were unused checks from No. 782 to 1000.

The second check book stub on the Clinton Trust Company numbered 8018, September 4, 1952, to check stub numbered 8518, November 17, 1952, as well as a folder labeled "Invoices to be filed, miscellaneous", which included—which contained therein 46—approximately 46 Brakes, Incorporated, invoices, various dates from February 22, 1954 to December 29, 1954, as well as containing two Brakes Center Incorporated invoices under dates of March 26, 1957, and January 8, 1956.

Q. Mr. Scudari, do you know when those documents which you have last described were turned over to the United States Government? (75) A. They were turned over May 14, 1957.

Q. Mr. Scudari, in referring to cash disbursements records you stated that these cash disbursements were of the

Bank of Manhattan and on the Clinton Trust Company

Now are these books and records of the Bank of Manhattan? A. They are journals of Brakes, Incorporated, containing checks drawn on the—on those banks.

Q. Mr. Scudari, from your training as an accountant is it possible to ascertain from the books and records which you have examined whether there were also kept at the same time records of sales and purchase invoices?

Mr. Kleinman: I object to that as purely speculative.

The Court: Overruled.

A. In examining the sales journal I notice contained on those journals were reference numbers and I was unable to find the reference which would correspond to those numbers.

Q. Were you able to find any references to accounts receivable and accounts payable ledger cards from the books and records which you inspected? (76) A. I did not find any reference to those cards.

The Court: I am not sure what you mean—that the records do not contain a reference or that you try to find the thing referred to and could not.

The Witness: From a review of those records I concluded I could not find a reference to them.

Q. Was there any reference contained in the books and records which you examined which would indicate the existence at one time of accounts receivable and accounts payable ledger cards? A. I would say that from a review of the general ledger which contained control accounts, I would, from past experience say that there must have been subsidiary individual accounts to support that control account in the general ledger.

Mr. Kleinman: I move to strike out the conclusion of the witness from his past experiences.

The Court: I will let it stand.

Mr. Bjork: You may inquire, Mr. Kleinman.

Cross Examination by Mr. Kleinman:

Q. Mr. Scudari, did you prepare the original memorandum receipt which was given to someone who delivered various books and records to room 431 of this building on January 4, 1955? (77) A. I did not.

Q. When were you first assigned to the investigation of this case? A. I was first assigned in approximately August, 1954.

Q. Did you visit the offices of Brakes, Incorporated? A. I visited the premises of Brakes, Incorporated.

Q. Where was that? A. 37-16 Queens Boulevard, Long Island City, New York.

Q. When did you visit those premises? A. I do not recall the exact date of my visit.

Q. Well, approximately—not the exact date. A. (No response.)

Q. Can you tell us the year? A. Yes, 1954.

Q. Did you find any other corporations doing business at the same address? A. I observed that outside the building of 37-16 there contained a big sign "Brakes Incorporated".

Q. Any other names? A. (No response.)

Q. You mentioned Brake Center before in your (78) testimony. A. Brake Center.

Q. Is that one of the corporations doing business there when you visited the place? A. I did not ascertain that fact.

Q. I see. You made no inquiry as to how many corporations were doing business in the same premises at the same address, did you? A. No, I did not.

Q. Did you actually visit the office of this corporation in 1954? A. No.

Q. Did you go inside? A. I did go inside the plant.

Q. Did you talk to any of the administrative help in the corporation? A. I spoke to a Mr. Libby.

Q. Were you at that time interested in finding out about the books and records and documents of Brakes, Incorporated? A. Not at that time.

Q. So that you made no inquiry as to the books, the existence of the books or what kind of books were kept, is that correct? (79) A. Yes, sir.

Q. Did you visit the place again some time later? A. I did not.

Q. Have you spoken to any of the former employees of Brakes, Incorporated—just yes or no, please. A. Yes.

Q. Did you speak to some lady who worked as bookkeeper or clerk for that company? A. I did.

Q. What is her name? A. Mrs. Elsie Hammerstein.

Q. She was formerly know as Miss Goldsmith—is that the same lady? (Indicating) A. Yes, sir.

Q. She is the lady who is seated in the courtroom now (indicating)? A. Yes, sir.

Q. Did you question her about the books and records and documents, etc.—just yes or no, please? A. Yes, sir.

Q. Did you find out from her how many were employed in the offices of that corporation? A. I did not—I questioned her concerning other (80) individuals.

Q. I am asking merely on that one point. A. No, sir.

Q. Well, from your investigation would you say that there were others who were employed in the office of that corporation? A. Yes, sir.

Q. Can you state how many of them? A. I cannot.

Q. Approximately, can you tell us? A. I cannot.

Q. But there was to your knowledge more than Miss Goldsmith or Mrs. Hammerstein? A. Yes, sir.

Q. What you have testified to here is that you have looked at all the books, papers and documents that were produced either in 1956 or more recently in 1957, on May 14th, is that correct? A. That is right, sir.

Q. In making your investigation did you determine or did you find out that there had been a fire in the office or the building of Brakes, Incorporated, some time in the past?

Mr. Bjork: I object to the question, your (81) Honor, as beyond the scope of the examination, outside the issues.

Mr. Kleinman: I am trying to find out where books, papers and documents are, your Honor. Maybe that will throw a little light on the subject.

Mr. Bjork: I will withdraw my objection, your Honor.

The Court: All right.

Q. Could you answer the question, Mr. Scudari? A. Will you repeat it, please?

(Question read.)

A. The information had come to our attention in the course of interviews that such a fire had taken place.

Q. Well, had you gone to the Fire Department of the City of New York to determine whether that information had some basis in fact? A. No, sir.

Mr. Kleinman: I have no further questions, your Honor.

The Court: Any redirect.

(82) *Redirect Examination by Mr. Bjork:*

Q. Mr. Scudari, did you at any time attempt to reach any of the officers of Brakes, Incorporated, to locate books and records?

Mr. Kleinman: What is the last part of it? I did not hear it.

Mr. Bjork: To locate books and records.

A. I did make an initial contact telephonically—not only in the connection of books and records but in the connection of conducting an interview with Mr. Lawrence Johnson.

Q. Did you conduct such an interview—

Mr. Kleinman: I object to that, if your Honor pleases. Is there an inference to be drawn against us if I told Mr. Scudari that we declined to have an interview—

Mr. Bjork: The only reason I brought it up is that you appeared to think there was some relevancy about his failure to talk to Mr. Johnson.

Mr. Johnson: I did not ask him that. I do not know how you could draw that inference at all.

Mr. Bjork: I will withdraw my question.

The Court: All right.

Mr. Bjork: I have no further questions.

(83) Mr. Kleinman: I have no further questions, your Honor.

The Court: All right, thank you, Mr. Scudari.

(Witness excused.)

Mr. Bjork: The Government next calls Frank Jaegeler.

FRANK JAEGELER, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination By Mr. Bjork:

Q. Mr. Jaegeler, was there a time when you were employed by a corporation known as Brakes, Inc.? A. There was.

Q. And would you tell the Court when you were so employed, sir? A. From 1951 to 1954.

Q. Would you try and keep your voice up so that everybody can hear you? A. Yes, sir.

Q. And by whom were you employed, sir? A. Mr. Johnson.

Q. Do you see Mr. Johnson in the courtroom? (84) A. Yes, sir, I do.

Q. Would you point him out, please?

(Witness indicates.)

Mr. Kleinman: He is indicating Mr. Johnson.

Mr. Bjork: May the record show that the witness has indicated Mr. Johnson.

Q. What were your duties when you were employed by the corporation Brakes, Incorporated, Mr. Jaegeler? A. First as a salesman—

Mr. Kleinman: I am sorry, I cannot hear him.

A. First as a salesman on industrial friction material.

Q. Were you subsequently employed in a different capacity? A. Yes.

Q. When was that? A. When Mr. Wittman left the employ of Brakes, Incorporated.

Q. Is that W-i-t-t-m-a-n? A. Yes.

Q. Will you try and keep your voice up so that everybody can hear you? A. I will.

(85) Q. Do you recall when Mr. Wittman left the employ of Brakes, Incorporated, if he did? A. I think it was in 1951 or 1952.

Q. And what were your duties with Brakes, Incorporated, after Mr. Wittman left? A. I packaged the material of the government contracts, had charge of the packaging.

Q. And in connection with those duties did you maintain any records? A. Yes, I did.

Q. What type of records did you maintain? A. I had the government contracts and files.

Q. Did you have anything other than the government contracts themselves? A. Just how do you mean that?

Q. Were there any other books and records which you dealt with at the time you were employed? A. No, just the government contracts.

Q. Did you maintain any records of certificates of compliance? A. That I did, yes.

Q. Would you describe to the Court how you maintained these records or certificates of compliance? A. I had them in—each contract was in an (86) individual file and when I made a shipment I had to make out a certificate of compliance and I put that right in the file with each particular government contract.

Q. And how many copies of how many certificates did you make of the certificates of compliance which you filled out? A. One I know went to 80 Varick Street and the other was kept in the file. There were just two copies of it.

Q. Did you keep any records of shipments which were

made to the government under these contracts on which you worked? A. Yes. In other words, if I shipped 1,000 against 3,000 I made a notation that we still owed 2,000.

Q. And where was that notation made? A. It was put right in with the file where each government contract was.

Q. Did you keep any record of billing or invoicing to the company? A. No, I didn't.

Q. Did you ever see any? A. No, I didn't.

(87) Q. Did you ever have any correspondence with the Ordinance Department at Varick Street or elsewhere? A. No, no correspondence, just verbal.

Q. Did you ever see any correspondence written by any employee or officer of Brakes, Incorporated? A. No, not to my knowledge.

Q. Mr. Jaegeler, are you able to tell the Court at this time what government contracts you worked upon at the time you were employed?

Mr. Kleinman: I object to that as irrelevant, your Honor.

The Court: I will take it.

A. If I saw a copy I would recall the numbers.

Q. Are you unable to state them at this time, sir? A. What?

Q. Are you unable to state them at this time? A. Not unless I saw the numbers.

Q. I show you Government's Exhibits 1 and 2, the subpoena duces tecum, and ask you if showing you that refreshes your recollection as to what government contracts you worked on while you were employed by Brakes, Incorporated (handing to witness)? A. I recall 12 of them.

(88) Q. Would you for the record state which contracts you recall? A. Do you want the full number?

Q. I think it would be sufficient if you would read the last numbers of the contract.

Mr. Kleinman: That will be satisfactory, if it is agreeable to the Court.

The Court: All right.

A. 4693; 5057; 6740; 7441; 8439; 9278; 9981; 12,244; 12442—did I give 4693?

The Court: That was the first one.

A. Those are the only ones I can identify.

Q. Would you try again, sir, to keep your voice up so that everybody can hear you? A. I will try.

Q. Mr. Jaegeler, when did you terminate your employment with Brakes, Incorporated? A. Around October of 1954.

Q. And at the time you left Brakes, Incorporated, where were the records, the government contracts, the certificates of compliance and the other related shipping documents kept? A. In the office in Long Island City.

Q. Whereabouts in the office? (89) A. In a filing cabinet.

Q. What type of filing cabinet? A. A steel cabinet.

Q. Mr. Jaegeler, where did you personally have a desk in Brakes, Incorporated, if you had one? A. In the corner of the office.

Q. And where was that located in relation to Mr. Johnson's desk, if Mr. Johnson had a desk? A. They were right alongside one another.

Q. Was there any system of filing used in Brakes that you could observe while you were employed? A. Not to my knowledge. All the filing was done in the New York office.

Q. When you speak of the New York office, sir, to what

do you refer? A. That is where the office help worked at that time.

Q. Do you know where that was located? A. On West 35th Street.

Q. And did there come a time when you were employed there that the office help on West 35th Street moved to Queens Boulevard? A. Will you repeat that?

(Question read.)

(90) Q. That is, moved from— A. Yes, they did.

Q. Was there any file basket kept on your desk in which you placed material which was to be sent to the files? A. There was a regular basket. Everything was put into that that was to go to the New York office.

Q. And were the government contracts and the certificates of compliance to which we referred previously put into that file basket to be sent to New York? A. Not while I was there, no.

Q. You, in fact, kept these separately in Queens? A. That's right.

Q. Mr. Jaegeler, did you ever place any purchase orders for material while you were employed by Brakes? A. Oh, for stationery and things like that, yes.

Q. Are you familiar with the form of purchase order which Brakes used, if they did use one? A. I would be.

Mr. Bjork: I ask that this be marked for identification.

(Marked Government's Exhibit 7 for identification.)

(91) *By Mr. Bjork:*

Q. Mr. Jaegeler, I show you a document marked Government's Exhibit 7 for identification purporting to be a purchase order of Brakes, Inc., numbered L8180 (handing to witness). Are you able to tell the Court whether or not this is a purchase order of the form— A. That is the type that was used.

Mr. Bjork: I offer Government's Exhibit 7.

Mr. Kleinman: I object on the ground of materiality, your Honor.

The Court: I will take it.

Mr. Kleinman: All right, sir.

(Government's Exhibit 7 for identification received in evidence.)

By Mr. Bjork:

Q. Mr. Jaegeler, while you employed by Brakes, Inc., do you know of a lawsuit being brought against the corporation, Brakes, Inc. by Bendix? A. Yes, I do.

Mr. Kleinman: I object to that, sir, and move to strike out the answer.

The Court: I will let it stand.

(92) Mr. Jaegeler, did you give a deposition in that lawsuit?

Mr. Kleinman: I object to that as immaterial.

The Court: Well, just the fact that he did, I will take that. Go ahead.

(Question read.)

A. I was issued a subpoena to appear in the Federal Court in Brooklyn. They asked me a few questions which didn't mean very much—

Mr. Kleinman: I move to strike out the conversation.

The Court: There will be no conversations taken.

Q. That is sufficient, sir.

Now, while you were employed by Brakes, Inc. did you have conversations with Mr. Johnson about the government contracts which you referred to as having been worked upon by you? A. Oh, yes, at various times we discussed it.

Q. Did Mr. Johnson ever ask for any of the government contracts which you had in your file?

Mr. Kleinman: I object to leading at this point, your Honor.

(93) The Court: I will let the question stand. Go ahead.

(Question read.)

A. At different times, yes, to see what shipments we made against each contract.

Q. Mr. Jaegeler, while you were employed by Brakes, Incorporated, do you know of any fire taking place on the premises? A. Yes, I do.

Q. Approximately when did that fire take place, sir? A. As to the date I am not too sure but I think—

Q. What is your best recollection? A. I would say it was in 1953.

Q. Where did this fire take place? A. Upstairs in the—in a sort of—one room separated, on the roof of the—it was upstairs.

Q. Do you know what was stored in that area where the fire took place, if anything? A. Brake parts, to my knowledge.

Q. Do you know whether or not any books and records were ever stored in that place? A. That I don't know.

Q. Did you ever see any books and records there? (94) A. No.

Q. Were you ever there prior to the time the fire took place? A. Oh, I was in and out of the building all the time.

Q. Subsequent to the time of the fire did you continue to work with the books and records, the government contracts? A. Yes, I did.

Q. Did you observe any of the documents to be charred or otherwise affected by fire? A. Not to my knowledge, no.

Q. Mr. Jaegeler, do you know whether the help had moved from—the office help had moved from West 35th Street to Queens Boulevard— A. Yes.

Q. —at the time that this fire took place? A. No, they were still in West 35th Street, to my knowledge.

Mr. Kleinman: I cannot hear his answer.

(Answer read.)

Q. Mr. Jaegeler, I call your attention to Government's Exhibit 5, certificate of compliance (95) and analysis and ask you whether or not these are— I will ask you whether you have ever seen them before? A. Yes, I have.

Q. When did you last see them, sir, prior to that? A. To the time when I made the last shipment on the last government contract.

Mr. Bjork: You may inquire.

Cross Examination by Mr. Kleinman:

Q. What is the date or the time when you last saw those papers, when you last made those shipments? A. It would be in 1954, the exact date I wouldn't know.

Q. Now where were you employed actually and in what place were you working in 1954? A. Long Island City.

Q. Do you remember when the move was made to Long Island City? A. The exact date I wouldn't know.

Q. Now you told his Honor about recalling exact numbers of certain certificates of compliance—

Mr. Kleinman: Or were those contracts that you said?

Mr. Bjork: Contracts.

Q. Contracts, rather, at the beginning of your (96) testimony; do you recall that? A. I do.

Q. Now can you tell me one of those numbers and what commodities that contract represented? Give me the number first. A. That would be pretty difficult to do because they were all different parts but I can recall the contract number for the simple reason I made quite a few shipments against each particular contract number.

Q. I see. Now can you tell us what each of those contract numbers represented by way of commodities shipped? A. Brake parts, to my knowledge.

Q. Are you guessing? A. No, sir.

Q. Can you tell us whether anything else was included other than the brake parts? A. Yes, sir.

Q. On any one of those contracts? A. Yes, sir.

Q. Which one? A. The number I am not too sure but there was one contract called for a thousand resistors, which is (97) not a brake part.

Q. You left the employ of Brakes, Incorporated, suddenly, didn't you? A. I took a vacation. I didn't go back.

Q. Never showed up again, did you? A. That's right.

Q. You weren't discharged, were you? A. No, sir.

Q. The truth of the matter is that you ran away when an investigation started in respect to the collection of moneys that was supposed to be turned over to the corporation, is that correct? A. Not to my knowledge, no.

Q. No. Well, what do you say caused your leaving the company? A. Just fed up.

Q. You did not like Mr. Johnson, is that it? A. No, that wasn't the reason.

Q. Didn't like your employment? A. The hours were kind of long.

Q. I see. Now you mentioned something about a fire. I believe you said that took place in 1953? A. Approximately, yes.

(98) Q. Well, when you say "approximately", do you mean that you don't remember the year? A. I didn't keep a diary or record or anything like that.

Q. Well, can't you tell us the year, then we will try to bring it down to the month. Can you tell us the year first of this fire? A. To my recollection I think it was in 1953.

Q. Where were you working in 1953? A. In Long Island City.

Q. When was the move made to Long Island City? A. What move?

Q. Well, there had been a move from some office to Long Island City, is that right? A. Oh, from 35th Street to Long Island City.

Q. Yes. When do you say that took place? A. I would say it took place in 1954.

Q. Didn't you tell us a moment ago that the fire was in Long Island City? A. I did.

Q. You mean that the Long Island City place was up and doing business before the West 35th Street moved was made to Long Island City? A. Will you please repeat the question?

(99) Mr. Kleinman: May I reframe it, your Honor?

The Court: Yes.

Q. When did you first go to Long Island City, you yourself? A. I started in Long Island City.

Q. When was that? A. About 1951.

Q. Then there came a time when the office in New York was moved over to Long Island City, is that right? A. That is right.

Q. That is what we call the West 35th Street office? A. That is right.

Q. When do you say that happened? A. To my knowledge it was in 1954.

Q. So that you say this fire took place some time in 1953 before— A. To my knowledge, yes.

Q. —now listen to my question, please. A. Yes.

Q. —before the people moved to Long Island City from New York and before the records went to Long (100) Island City from New York, is that correct? A. Will you please repeat the question?

(Question read.)

A. To my knowledge, yes.

Q. And is that what you advised the United States Attorney when he questioned you about this before you took the stand this afternoon? A. Will you repeat it, please?

(Question read.)

A. Not to my knowledge, no.

Q. Well, you were asked, were you not, about the fire before you took the stand? A. Yes, I was.

Q. Who asked you that? A. Mr. Bjork.

Q. And did you tell him that the fire took place, in your opinion, in your recollection in 1953? A. I did.

Q. And did you tell him that the fire took place before the records were moved from New York to Long Island City? A. I didn't tell him that, no.

Q. Now you think and give us the answer now. (101) Is it your testimony that this fire took place before the records were moved from New York to Long Island City? A. To my knowledge, yes.

Q. And did Mr. Bjork ask you in what portion of the building the fire took place? A. He did.

Q. Now give us your answer to that. What portion do you say? A. It was upstairs.

Q. Pardon? A. It was upstairs on the second floor.

Q. Now when in 1954 did you leave the employ of Brakes, Incorporated? A. Around October, I would say.

Q. Were you employed in Brakes, Incorporated, on July 9, 1954? A. I was.

Q. Were you working in or about that period of July, 1954? A. I was.

Q. Was there not a fire on or about July 9, 1954, in the basement of the Long Island City office of (102) Brakes, Incorporated?

Now think hard, Mister. A. No, I don't recall it.

Q. Now is it your testimony that there was no fire in July of 1954 in the Long Island City plant of Brakes, Incorporated, or the offices in Long Island City? A. To my knowledge—

Mr. Bjork: I object to the form of the question, your Honor, as not having been what he testified to.

Mr. Kleinman: I don't quite follow it. I will be perfectly willing to conform to what Mr. Bjork thinks he testified to.

The Court: What did you say?

Mr. Bjork: I think the form of the question is objectionable.

May we have the question read?

(Question read.)

The Court: I will overrule the objection. Go ahead.

Q. You may answer. A. To my knowledge, no, because I was in Brooklyn at the time.

(103) Q. Then—

Mr. Bjork: What was the answer?

(Answer read.)

Q. The truth of the matter is that you were not even working in the Long Island City office of Brakes, Incorporated, in Long Island City in 1954, is that correct? A. That is correct.

Q. How long had you been working in the Brooklyn office? A. Oh, three months, four months.

Q. When did you start to work in the Brooklyn office? A. The date is hazy.

Q. I cannot hear you, sir. A. I say the date is hazy.

Q. Well, give us approximately the time of the year, the season of the year or a month, if you can tell us. A. Well, I would say around April of 1954.

Q. So that from April of 1954 until the time you left the employ of Brakes, Incorporated, you were working in Brooklyn, is that right? A. When I started in Long Island—

(104) Q. Will you please answer the question? A. Yes.

Q. You were not working in Long Island City from April to October, 1954, is that correct? A. I would say yes.

Q. And Mr. Johnson had his desk in that room that you mentioned before in Long Island City, is that right? A. That is right.

Q. Well, if you were not working in Long Island City, did you not hear that there was a fire in the Long Island

City office of Brakes, Incorporated, on or about July 9, 1954? A. There is some recollection of that.

Mr. Kleinman: All right, that is all.

Redirect Examindtion by Mr. Bjork:

Q. Mr. Jaegeler, the Brooklyn office to which you referred, where was that located? A. Third Avenue and—between 6th and 7th—between 7th—between 6th and 7th Streets.

Q. And who else was employed at that office? A. There were six people.

Q. And while you were employed at the Brooklyn office did you continue to handle the government (105) contracts from that office there? A. No, I did not. The government contracts had been completed.

Q. When was the last time that you saw the government contracts and the certificates of compliance, to which you referred, at the Queens Boulevard office, which I assume is in Long Island City—

Mr. Bjork: Is that correct?

Mr. Kleinman: Yes.

A. Just previous to being transferred over to the Brooklyn place.

Q. That was in April of 1954? A. Approximately, yes.

Q. And you subsequently left the employ of Brakes, Inc. in October, 1954? A. I did.

Q. And did you return at any time to the Queens offices of Brakes, Inc. during the period between April and October of 1954? A. Almost every day.

Q. During the period of time between April and October did you see the government contracts in the Queens office? A. No, all I saw was the files.

(106) Q. The files still were where they had been left? A. Yes.

Mr. Kleinman: The steel files, you mean, Mr. Bjork.

Q. Did you see anything inside the file cabinets or— A. I had no occasion to look into them once the contracts were completed.

Q. You said in answer to Mr. Kleinman that you heard that a fire had taken place. A. In the cellar, yes.

Q. In the cellar. That is not the same fire, sir, to which you referred earlier. A. No, that is a different one altogether.

Q. From whom did you hear about this fire taking place? A. From the boys in the place.

Q. Did you ever discuss it with Mr. Johnson? A. No.

Q. Did you ever ask Mr. Johnson about the fire? A. No, I did not.

Q. During the time that you were employed by Brakes, Incorporated, did you ever store any books (107) and records in the cellar at Queens Boulevard? A. I did not, no.

Q. Do you know of any records having been stored there?

Mr. Kleinman: I object to that as calling for a conclusion and purely speculative. He did not do it, he testified.

The Court: What was the next to the last answer?

(Record read.)

The Court: I will overrule the objection in so far as "No" means having seen himself.

Mr. Bjork: That is correct. I will withdraw the question.

Q. Were you ever in the basement at Queens Boulevard? A. Yes, I had been there at different times.

Q. And what did you see while you were there?

Mr. Kleinman: May we have a time fixed, please?

Q. When did you go to the cellar, if you recall? A. At various times.

Q. Do you recall the last time that you went to the cellar? (108) A. That would be hard to say.

Q. What is your best recollection? A. Oh, I would say in 1953 or the early part of 1954.

Q. And what did you see while you were there?

Mr. Kleinman: I object to that as too remote and immaterial.

The Court: I will let him answer.

A. I saw a lot of material.

Q. Did you see any books and records of any sort? A. Not to my knowledge, no.

Mr. Bjork: I have no further questions.

Recross Examination by Mr. Kleinman:

Q. Mr. Jaegeler, do you remember the time when the office force from New York moved over to Long Island City? A. I recall it, yes.

Q. Were there all the records and the books and the documents taken from New York and brought over to Long Island City? A. I wouldn't know if all of them were brought over, no.

Q. Well, can you tell us whether you saw records (109) and books and documents brought from New York to Long Island City? A. I did.

Q. How many people were employed in the offices at Long Island City? A. You mean after the New York office moved over?

Q. After the New York office moved over, yes, sir. A. Four girls, to my knowledge.

Q. Any men? A. No.

Q. You had access to the records, did you not? A. I did.

Q. And these girls had access to the records? A. They did.

Q. How many people worked in the plant in Long Island City, can you tell us? A. It varied at different times.

Q. About? A. I would say approximately between 30 and 40.

Q. How many corporations were doing business from the Long Island City offices? We had Brakes, Incorporated, right? A. That is right.

(110) Q. Then we had Brake Center? A. Right.

Q. Then we had— A. No, I am sorry.

Q. All right, then you tell us names. A. There were two holding corporations.

Q. What were the names? A. I would have to have my memory refreshed on that. There was Brakes of Brooklyn, Brakes, Incorporated, Long Island City.

Q. These were all separate corporations, weren't they? A. Yes, they were.

Q. Mr. Jaegeler, when you told us before about a fire which you remembered in 1953 did you have no recollection of this fire in 1954?

Mr. Bjork: I object to the question. He has not testified that he knew of any fire in 1954. His answer was only that he heard from the boys that there was a fire.

Mr. Kleinman: Well, I see his point, your Honor.

The Court: All right, go ahead.

Q. When you testified that you knew about a fire (111) in 1953, had you forgotten that the boys told you that there had been a fire in 1954? A. In other words, the one upstairs must have overshadowed the one that was in the cellar, to my knowledge.

Q. Are you a drinking man, Mr. Jaegeler? A. I take a drink, yes, sir.

Q. Did you take a drink before you took the stand today? A. I did not.

Mr. Kleinman: I have no further questions.

The Court: All right, anything else?

Mr. Bjork: That is all, Mr. Jaegeler.

(Witness excused.)

Mr. Bjork: Mrs. Elsie Hammerstein.

The Court: Let us take a recess now. We will adjourn until 2 o'clock.

(Recess taken until 2 P.M.)

(112) AFTERNOON SESSION

Mr. Bjork: Mrs. Hammerstein, please.

ILSE HAMMERSTEIN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Bjork:

Q. Mrs. Hammerstein, by whom are you employed? A. Brake Center, Incorporated.

Q. And where is that located? A. At 37-16 Queens Boulevard in Long Island City.

Q. And in what capacity are you employed? A. Bookkeeper and—head bookkeeper.

Q. Are you an officer of that corporation? A. I believe so.

Q. What office do you believe you hold? A. Secretary-treasurer.

Q. When were you first employed by Brake Center? A. October 1954.

Q. Had you previous to that time been employed by Brakes, Inc.? A. I was.

Q. And where were you located when you were employed by Brakes, Inc.? (113) A. The office was first located at 535 West 35th Street, New York City, and later at 37-16 Queens Boulevard in Long Island City.

Q. Mrs. Hammerstein, are you familiar with the other officers of Brake Center, Inc.? A. Yes, sir.

Q. Who are they? A. Mr. Charles Libby.

Q. Is there any other officer? A. No.

Q. Is Mr. Johnson employed by Brake Center, Inc. to your knowledge? A. Yes, he is.

Q. In what capacity is he employed? A. Well, in an office and advisory. It is an executive position.

Mr. Kleinman: Did you understand he was president?

Mr. Bjork: No.

Mr. Kleinman: I thought I could stipulate something. I am sorry.

(Counsel confer)

Mr. Kleinman: Oh, this is Brake Center. I'm sorry. I thought we were talking of Brakes, (114) Incorporated.

Q. What office does Mr. Libby hold in Brake Center, Inc.? A. I believe he is the president.

Q. When is the last time that you saw Mr. Libby? A. A number of months ago.

Q Do you recall how many months ago? A. It could be close to a year. I am not sure.

Q. In Mr. Libby's absence who runs the corporation?

Mr. Kleinman: Well, I must object to this. First I thought we were confining ourselves to Brakes, Incorporated. Now, it seems that Mr. Bjork is asking questions about Brake Center, which is an entirely different corporation and not the subject of this investigation.

The Court: I will let him go on for a while and see what happens.

Mr. Kleinman: All right, sir.

Mr. Bjork: Would you read the question, sir?

(Question read)

A. Well, Mr. Johnson is in an executive capacity and I run the office.

Q. Do you still consider Mr. Johnson to be your boss? (115) A. Well, he is called that, yes.

Q. The business of Brake Center, Inc., is that any different to your knowledge than was the business of Brakes, Incorporated?

Mr. Kleinman: I object to that as irrelevant and immaterial.

The Court: On that ground I would overrule the objection.

Mr. Kleinman: Well, I object to it upon the ground of materiality to the issue involved.

The Court: I will overrule that. Go ahead.

(Question read)

A. It is generally the brake business I would say. There is no great difference.

Q. Mrs. Hammerstein, when you were employed by Brakes, Inc., what was your job then? A. Head bookkeeper.

Q. Did you hold any office in the corporation Brakes, Inc.? A. I was under the impression that I was, but I was told I was not.

Q. I beg your pardon, madam? A. I was under the impression last week that I was but I was informed that I was not.

(116) Q. That you were what, Mrs. Hammerstein? A. That I had been—I was under the impression that I had been secretary-treasurer but I was subsequently informed that I was not.

Q. When were you so advised? A. Last week sometime.

Q. And prior to that time had you held yourself out to marshals of the United States as being the secretary-treasurer of Brakes, Inc., specifically in November of 1955? A. May I hear that question.

Q. I will rephrase it, Mrs. Hammerstein, if you are in doubt.

In November 1955 did there come a time when a marshal gave you a subpoena for the production of certain corperate books and records? A. Yes, sir.

Q. And at that time did you tell the marshal that you were secretary-treasurer of Brakes, Inc.? A. I might have.

Q. Mrs. Hammerstein, I show you Government's Exhibit 1 and ask you if you have ever seen that before (handing). A. I believe so.

(117) Q. And when did you first see that? A. Well, may I explain as to that?

Q. Certainly. A. It was shown to me last week in the grand jury room and according to conversation then or testimony, rather, that was the subpoena handed to me in 1955 but I, I don't recall the details—I did not recall the details of it.

Q. Do you recall having been served with a subpoena in 1955? A. Yes, I did after that time.

Q. And you do not know at this time whether that is the same subpoena which was served upon you in 1955? A. No, sir.

Mr Kleinman: May I see that? Perhaps I can concede it.

(Handed)

If it might shorten the proceedings, your Honor, I have some records in my file with reference to this subpoena and I think this might be of some assistance.

Mr. Bjork: At this time, Mr. Kleinman, if you would be willing to stipulate that this was the subpoena that was served on Mrs. Hammerstein, (118) that would be sufficient for my purposes.

Mr. Kleinman: Well, all right, if Mrs. Hammerstein has no other recollection I believe that this was because I received a copy of it at some time.

The Witness: I believe so.

The Court: All right.

Mr. Kleinman: Yes.

Q. Mrs. Hammerstein, when you were served with that subpoena, what did you do? A. I contacted either Mr. Kleinman and Mr. Shapiro or both.

Q. Did you have any conversations with Mr. Johnson about having been served with a subpoena? A. I don't recall any particular occasion of discussing it with him.

Q. I would like to go back for a minute, Mrs. Hammerstein. Where were you located in July of 1954? A. On West 35th Street in Manhattan.

Q. And did there subsequently come a time when you moved from West 35th Street? A. Yes, sir.

Q. To Queens Boulevard? A. Yes, sir.

Q. When was that? (119) A. Around Labor Day of 1954.

Q. And when you left West 35th Street did you supervise the moving of the books and records which were stored at West 35th Street to Queens Boulevard? A. I was not present when they were moved.

Q. Do you recall what books and records were maintained by the corporation Brakes, Inc. while you were located at West 35th Street? A. All subsidiary journals and everything of that sort. Do you want me to list every one of them?

Q. Well, tell us as well as you can what type of books

and records you were in charge of while you were at West 35th Street. A. It was a double-entry set of books with accounts receivable invoices, accounts payable invoices, a general ledger, a cash journal, a sales journal and a general journal.

Q. Were there any records maintained of inventory? A. No, sir.

Q. Were there records kept of sales and purchase invoices—that is, records of bills due to people and bills payable from people? A. Yes, sir.

Q. And do you know whether or not any of these (120) books and records you have described cover dealings of the corporation Brakes, Inc. with the United States Government? A. Yes, sir.

Q. And did they? A. There were, yes, sir.

Q. Mrs. Hammerstein, while you were located at West 35th Street do you know whether or not any correspondence took place between the corporation Brakes, Inc. and the United States Government? A. I do recall some conversation regarding payments. I don't know whether they were in writing or by telephone.

Q. Do you recall seeing at any time any correspondence between the United States Government and Brakes, Inc., which was in the file or a file of Brakes, Inc.? A. I might have, but I don't recall any particular occasion.

Q. Was there a filing system with which you were familiar used for correspondence between the corporation and outside customers? A. Yes, sir.

Q. Would you describe to the Court what that system was? (121) A. Well, it was an alphabetical system with manila folders.

Q. And the alphabetical system which you refer to, do you recall whether there was a manila folder covering Government correspondence? A. I think there was.

Q. Who handled the filing of correspondence? A. Mrs. Cohen.

Q. And where was she located prior to July of 1954? A. On West 35th Street in Manhattan.

Q. And did she subsequently move to Queens Boulevard at the same time that you did? A. Yes, sir.

Q. Did you take any stenography or any shorthand while you were employed by Brakes, Inc.? A. On very rare occasions when Mrs. Cohen was on vacation.

Q. And how would you take that shorthand or from whom initially would you take such shorthand? A. Mr. Johnson.

Q. And would you take that from him personally? A. Well, while the girls were on West 35th Street Mr. Johnson would ordinarily dictate over the phone. In earlier years he used to come to the office in (122) New York once in a while, but the years that I remember he used to dictate over the telephone.

Q. And you would transcribe in the office at West 35th Street? A. Yes, sir.

Q. And did you maintain carbon copies of the letters which you sent out? A. Yes, sir.

Q. And where were they kept? A. In the correspondence file.

Q. And where was the correspondence file kept? A. With the other files up near Mrs. Cohen's desk. I don't recall exactly.

Q. But that was on West 35th Street? A. Yes, sir.

Q. You stated that you moved on West 35th Street around Labor Day of 1954, is that correct? A. Yes, sir.

Q. Now, when you moved, do you know whether or not the files and records were transferred to Queens Boulevard? If you can answer yes or no, that will be sufficient. A. They were all taken over so far as I know. That was my understanding.

(123) Q. Mrs. Hammerstein, have you ever heard while you have been employed or while you were employed by

Brakes, Inc. of a fire in the basement? A. Yes, sir.

Q. When did you first hear of such a fire? A. I think it was the day after it happened or two days after it happened, around the time it happened.

Q. Do you recall when it was that it happened? A. I believe it was sometime in 1954.

Q. Do you recall when in 1954? A. It was—I believe it was—well, it had to be before we moved there because I know I wasn't there.

Q. You know you had not as yet moved to Queens Boulevard at the time this fire took place? A. No, I am not sure now.

Q. What is your best recollection? A. Well, I wasn't there yet, no. I wasn't there yet, sir.

Q. You are sure you were still located— A. I was in New York, that is right.

Q. —in New York? A. Yes.

Q. Now, Mrs. Hammerstein, did there ever come a (124) time when you had a conversation with Mr. Johnson with respect to producing books called for by the United States Government? A. He asked me about records at various times.

Q. When was the first time that you ever had any such conversation? A. In 1954.

Q. Where did the conversation take place? A. I beg your pardon, did you say in regard to the United States? A. Yes, ma'am.

Q. I am sorry, I didn't answer accordingly. I thought just generally records.

Q. No, I am speaking now solely— A. I am sorry.

Q. —of requests or subpoenas directed—I will withdraw that.

I am speaking solely of subpoenas issued by the United States District Court with reference to the demands of the grand jury. I am not speaking of any other subpoenas which were issued. A. I am sorry.

Q. Did you ever have a conversation with Mr. Johnson about producing books to the United States (125) Government? A. He asked me about records several times—

Q. Mrs. Hammerstein— A. —after—I am sorry.

Q. If you can, would you first tell us when such conversation took place, to the best of your recollection? A. I couldn't. It would be after 1954.

Q. And do you recall where these conversations took place? A. Well, there were some in the office, I know.

Q. At Queens Boulevard you are speaking of now? A. Yes, sir.

Q. Were there any other persons present when you talked to Mr. Johnson about the records? A. Well, the other girls were there.

Q. And by "the other girls," whom do you mean? A. Mrs. Cohen and Miss Curtis.

Q. Who is Miss Curtis? A. She is an assistant.

Q. Mrs. Hammerstein, do the three ladies to whom you have referred, including yourself—Mrs. Cohen, Miss Curtis and yourself, are you the only three girls who handled the filing? A. Now, yes, sir.

(126) Q. Now, when you say "now", was there ever a time when more people handled the correspondence than the three to whom you have referred? A. During Brakes, Inc., there were four girls.

Q. And who were they? A. Well, they were different girls.

Q. In September of 1954 who were those girls, if you recall? A. Besides the three mentioned including myself in September of 1954 or around that time, there was Mrs. Maggio.

Q. Subsequent to the time that you moved from West 35th Street to Queens Boulevard did you continue to keep records of invoices and purchases such as you had done previously when you were at West 35th Street? A. Yes, sir.

Q. And where did you store those?

Mr. Kleinman: May I ask your Honor, is this confined to the Army contracts, the records concerning the Army contracts?

Mr. Bjork: All my questions are intended to be confined—

Mr. Kleinman: I think I understand that (127) but I wonder if the witness does.

Mr. Bjork: —to the books and records, unless otherwise indicated.

The Court: Books and records generally?

Mr. Bjork: Well, sir, initially I would like to find out whether there was any general pattern of keeping the books and records in the corporation.

The Court: All right. As long as it is clear.

Mr. Kleinman: Yes, as long as she knows what she is being asked.

Q. In general, Mrs. Hammerstein, after you moved from West 35th Street did you continue to keep records of invoices, calling for payment, and invoices which you had sent out to other people calling for payment to Brakes by them? A. Yes, sir.

Q. Do you recall ever seeing any invoices to the United States Government from Brakes, Inc., subsequent to the time that you moved to Queens Boulevard? A. I might have, yes, sir.

Q. Do you recall whether or not you did? A. I can't just—I can't think of any particular occasion at the moment.

(128) Q. To the best of your recollection did you ever see any such invoices after October of 1954? A. I can't think of any particular occasion of seeing invoices.

Q. Where did you store the invoices that you did see?

Mr. Kleinman: May we have a time fixed, your Honor?

Q. Subsequent to Labor Day of 1954.

Mr. Kleinman: Now I should like to inquire whether we are again speaking generally of all invoices or specifically now.

Mr. Bjork. At this point I am speaking generally, sir.

Mr. Kleinman: All right.

Q. Any invoices sent out by Brakes, Inc. to any persons whatsoever. A. The very current file of the present year would be right—actually in the office and possibly a prior year at times were kept in the office in a little partition where the filing room is, which we call the filing room, rather—and that older invoices at times were kept in the basement so far as I know. I have never been in the basement—

(129) Mr. Bjork: Then I move to strike out the answer, your Honor, on the ground that she has never been to the basement.

Mr. Kleinman: Well, this is in response to his question, your Honor.

The Court: You can ask her about it. Go ahead.

Q. Were you ever in the basement, Mrs. Hammerstein? A. No, sir.

Q. Then actually you do not know whether there were any records stored there or not, is that correct? A. I believe I have sent somebody down to get some, but I wouldn't know when, but I do remember sending people for invoices or—I believe invoices.

Q. You do not know whether there were invoices or not? A. Invoices.

Q. You are sure they were invoices? A. I believe so.

Q. What kind of invoices? A. Any old invoices.

Q. Do you ever recall sending anybody to get Government invoices? A. No, sir.

Q. Do you know whether or not there are any (130) accounts receivable of Brakes, Inc., referring to the United States Government, still open with the corporation? Does the Government owe Brakes, Inc. any money to your knowledge? A. There is a small balance owing, yes.

Q. And where do you maintain that record? A. In Long Island City.

Q. And have you seen that? A. Yes, sir.

Q. And where was that stored? A. In the office.

Q. In the file room to which you have referred or in a different area? A. No, in the office.

Q. Is that a separate room from the file room? A. Well, it is—there is a door—there is an entrance without a door. It is practically the same thing.

Q. Miss Hammerstein, did the corporation Brakes, Inc. have any set policy with respect to the disposal of corporate records? A. Yes, sir.

Q. What was that? A. They were kept between six and seven years.

(131) Q. Do you recall at any time ever throwing out any records which were newer, if you will, than that six or seven year period to which you referred? A. No, sir.

Q. Are you familiar with the manner in which billings were made to the United States Government by Brakes, Inc.—will you answer yes or no first, if you will? A. May I ask something, a question?

Q. Surely. A. You mean the typing of the bill and mailing it out?

Q. No, ma'am. Well—yes. A. Yes, sir.

Q. How was that handled? A. There was a register copy which was used on the machine which was sent to the office in New York and then certain copies—certain customers just received the customer's copy which was handwritten, and certain customers received the typed copies.

Q. Do you know what system was used for the Government? A. The Government received typed copies.

Q. And where were those records stored after they (132) were sent out, if you know? A. They were kept in New York.

Q. And were they moved then to Queens Boulevard at the time you left in 1954? A. Yes, sir.

Q. Do you know whether Brakes, Inc. kept any records of the shipments made on the Government contracts in which it was engaged? A. I have no direct knowledge other than the invoices.

Q. Did you ever see any copies of the Government contracts which you were billing on? A. I saw some papers at some time in Long Island City which had numbers on them.

Q. Was that subsequent to Labor Day of 1954? A. I couldn't place the date exactly, sir.

Q. Was it prior to the time that you moved from New York to Long Island? Was it before you moved? A. I am not sure. It probably was after, but I am not sure, sir.

Q. How often did you go to Queens Boulevard when you were located in New York? A. I used to hold collection discussions once in a while.

(133) Q. In Long Island City? A. Yes, sir.

Q. Now, Miss Hammerstein, in the past month do you recall being served with a grand jury subpoena? A. Yes, sir.

Q. Now, at that time or subsequent to that time did you

have any conversation with Mr. Johnson about the whereabouts of Government books and records? A. Yes, sir.

Q. When was the first such conversation? A. There were many discussio —not discussions but many conversations, and I could only surmise that it was right after I was served.

Q. Do you recall any conversations at that time? A. I do.

Q. And who was present? A. Again I would say it was in the office.

Q. Were there any other persons present at the time? A. Probably.

Q. Do you recall? A. One of the girls probably.

Q. Do you recall which one? A. No, sir.

(134) Q. Are you sure there was another girl there? A. It was—I believe it was early in the morning, and I don't know if both of them were there yet.

Q. Will you tell the Court what Mr. Johnson said to you and what you said to Mr. Johnson? A. Mr. Johnson asked me if there were any records and I said I didn't think there were any records.

Q. Did he ask you to go look for any? A. No, sir.

Q. Mrs. Hammerstein, subsequent to the conversation with Mr Johnson, did you go out and look for books and records yourself? A. At a later date?

Q. Yes, ma'am. A. Yes, sir.

Q. Did you find any? A. Yes, sir.

Q. And where did you find them? A. In a small room upstairs in the Long Island City—over the Long Island City office.

Q. And do you recall what books and records you found up there? A. Well, there were sales—a sales—sheets of a sales journal, and the same of a cash journal and (135) then there was one year of a general journal and then there was small—there were some small single items—I don't

recall exactly what the books were but I do remember the ones I mentioned.

Q. Were any of the books which you found charred in any way, bore marks of having been burned? A. No, sir.

Q. Did any of the books which you produced show any signs of being in water or being damaged by other such deterrents of fire?

I have the books and records here (indicating), if it will refresh your recollection. A. No, sir.

Q. How did you come to go out and look for those books and records, Mrs. Hammerstein? A. I was directed by you and the grand jury to look for them.

Q. Approximately how many people were on the payroll of Brakes, Inc. at the time you were located in New York? A. There were various but I guess it would be around 40.

Q. Approximately how many people are on the payroll of Brake Center, Inc. at the present time? (136) A. About 50 would be the Brooklyn branch.

Q. Now the Brooklyn branch to which you refer, what is that? What kind of business does that do? A. The same. Generally the same as the Long Island City shop. They also do some extension and chassis work which the Long Island City shop does not do, but generally I would say it is the same.

Q. Is it something in the nature of a repair shop? A. Yes, sir.

Q. Now, Mrs. Hammerstein, we spoke a few moments ago about fire. Do you recall hearing of more than one fire? A. After Mr. Jaegler's testimony it came back to me.

Q. Do you recall at the present time having heard of a fire prior to today in the basement at Queens Boulevard? A. Yes, sir.

Q. And do you recall having heard of any other fire? A. Well, my memory was refreshed of the other fire. I had forgotten about it.

Q. And it is now your present recollection that there was more than one fire, is that correct? (137) A. Yes, sir.

Q. And where was the other fire? A. Well, this would be—it came back to me through information that I have heard recently.

Q. But do you recall it now? A. Yes, there was a machinery loss or parts loss. That is why I remember it.

Q. And do you know where those parts—I withdraw that. Do you know where the machinery and the parts to which you refer as having been lost, do you know where they were stored? Where did this fire take place, if that isn't clear? A. Upstairs someplace

Q. Do you recall when that fire took place? A. Well, I was trying to reconstruct it. That is prior to the other fire.

Q. And the other fire to which you refer was the fire in the basement? A. Yes, sir.

Q. Which took place sometime, did you say, during the summer of 1954? Is that correct? A. Sometime in 1954, yes.

Q. Sometime prior to the time that you came from (138) New York to Queens? A. That is right.

Q. Have you looked in the basement for any books and records subsequent to November of 1955? You spoke before of sending somebody down there? A. I myself never looked there, no.

Q. Have you sent anybody down there? A. Yes, sir.

Q. Whom, first, did you send? A. You mean after the order in court?

Q. Yes, ma'am. A. Frank Gerwer.

Q. And when did you send him? A. The same day I looked for the records upstairs.

Q. Did he find any books and records of any sort down there? A. He said there were no records downstairs.

Q. Of any sort? A. Well, that was his answer, sir.

Q. Do you recall at any time directing the records be stored in the basement? A. No direct order. It was agreed that would be the only place there would be room.

Q. Do you recall ever sending any records down there? (139) A. My personal direction, I don't recall an occasion.

Q. Do you recall anybody else in your presence directing that records be sent down to the cellar? A. No, sir.

Q. Did there ever come a time when you personally obtained records from the cellar—any type of records whatsoever? A. Yes, sir.

Q. What type of records were they? First of all, when? A. While I was in Long Island City.

Q. And what was the occasion of your request? A. I am guessing now.

Q. Well, I don't want you to guess A. An invoice probably.

Q. And when to the best of your recollection was that request made? A. I can't—I couldn't place it. It is a long time ago. I know it is a long while ago.

Q. Was it subsequent to the time that you moved to Queens Boulevard?

Mr. Kleinman: Your Honor, this is all predicated upon a guess and now he is trying to become more positive, and I submit that we are going (140) to get confused if the original recollection is no more than a guess.

The Court: I will let him pursue that and see what happens. He is trying to strengthen her recollection.

Mr. Bjork: Would you read the question, please?

(Question read)

A. I couldn't be sure, sir.

Q. Actually the whole area of sending somebody to the cellar to get an invoice is just a guess on your part? A. I know there was an occasion, but I couldn't recall when it

was. I would say that there was an occasion but I couldn't say when

Q. Do you recall whether or not you got the invoice that you sent for? A. I think so.

Q. Was it burned? A. I don't recall.

Q. You don't recall whether or not it was burned or you don't recall whether you got it at all? A. I would have to guess further if I would answer more. I remember seeing something that was wet—that could have been wet, but when I couldn't say. (141) I think a file copy or something. It is very hazy, sir.

Q. Do you ever recall, Mrs. Hammerstein, subsequent to the time that you moved to Queens Boulevard seeing any Government contracts between Brakes, Inc. and the United States Government?

The Witness: May I hear the question again?

(Question read)

A. I remember some contracts during the Bendix-Westinghouse litigation. I couldn't place the date exactly. It should be in 1954.

Q. Subsequent to the time that you moved from West 35th Street to Long Island City? A. It might be after that.

Q. Do you recall? A. For sure, no, sir.

Q. What is the best of your recollection? A. It might have been after we moved.

Q. Where were they located when you saw them?

Mr. Kleinman: Now, your Honor, I must object to that. This is all predicated upon this guess that it might have been and now Mr. Bjork wants to know where. If she is guessing as to the original premise, I don't think we can get any more satisfactory answer.

The Court: There is no guess as to the (142) original premise. She saw them during the litigation

Mr. Kleinman: Yes.

The Court: Now, whether it was before or after she moved, he asked her for her best recollection and she said it might have been after. Now he is trying to find out the location.

The Witness: May I hear the last question?

(Question read)

A. I believe in a file on the floor.

Q. When you say a file on the floor, what kind of a file was it? A. It could have been an old file or trans-file.

Q. Now, I am going to ask you, Mrs. Hammerstein, to the best of your ability to answer the questions more directly. When you say it could have been, that really isn't satisfactory either to myself or to the Court or to Mr. Kleinman, I am sure, either. All I am asking is to the best of your recollection where was it located in the first place, this file that you saw? A. Someplace on the floor in the office.

Q. Was it in a file cabinet? A. In a cabinet—in a drawer rather, not a cabinet, that belonged in a—well, that belongs in (143) a regular four or five-up file.

Q. And did you keep those four or five up-files? Were they stored on the main floor, main store, if you will, at the plant on Queens Boulevard? A. Yes, but this didn't belong anyplace there.

Mr. Kleinman: I can't hear you. I am sorry.

A. I know there was a file on the floor. Where it belonged, I don't know.

Q. Was it part of a steel file or a cardboard file or what? A. It might have been either.

Q. Do you recall which? A. Not for sure.

Q. I am going to ask you not to speculate, Mrs, Hammerstein. If you can't recall, give us your recollection. If you can't recall, just say you don't remember.

Can you not recall at his time when you saw that file on the floor?

Mr. Kleinman: No, I think she has testified during the course of that litigation, your Honor. That was fixed.

The Court: I think that is so.

Q. You can't place it any better with reference (144) to the time that you left 35th Street, is that correct? A. Yes, sir.

Q. Yes, you cannot? Is that right, Mrs. Hammerstein? A. Yes.

Q. I don't mean to confuse you. A. Yes. May I explain something?

Q. Surely. A. From the beginning of the Bendix-Westinghouse litigation there were so many records required that a lot of things are so hazy in my mind because they weren't restored to their proper places and my mind is not too clear about any particular one because there were so many things requested.

Q. Do you recall any request ever having been made during the course of that suit for Government contracts? A. I recall Government invoices. I don't recall contracts.

Q. You don't recall ever being asked for Government contracts? A. Well, I am not sure about contracts.

Q. How about certificates of compliance? Have you ever seen them stored in the records of Brakes, Inc.? (145) A. I saw something with an order number. I don't know what it was. Whether it was an order or any other paper, I wouldn't know.

(145) Q. I show you Government's Exhibit 5 and ask you if that refreshes your recollection whether you have ever seen any certificates of compliance and analysis in the files of Brakes, Inc. A. I might have. I couldn't say.

Q. Does it refresh your recollection whether or not you have seen it or something like that before? A. Something like it, I might have, yes, sir.

Q. I am afraid that your answer, Mrs. Hammerstein, is that you might have seen it. Now, I am just asking you whether at the present time you can recall whether or not you have ever seen a document like that in the files of Brakes, Inc.

Mr. Kleinman: Well, "a document like that" might get a response, "something like that."

The Court: Let's hear what she says.

A. I couldn't say whether I saw the identical thing, but I might have seen something like it.

The Court: What Mr. Bjork wants to know is whether you did see something like that, whether it is your best recollection that you saw something (146) like that. When you say that it might, literally that "might" could mean anything. You might have done anything.

The Witness: Well, the words "certificate of compliance and analysis", when I am asked about it, doesn't mean anything to me, sir.

Q. And having seen the papers before you which are marked Government's Exhibit 5 does not aid you in answering my question? You can't recall whether you have seen a document of that type? ? A. No, sir.

Q. Do you recall at any time Mr. Johnson's directing

you to go look for books and records called for in a Government's subpoena?

The Witness: I am sorry; may I hear that question?

(Question read.)

A. May I ask something?

Q. Can you answer the question as it is put to you? A. Not in those words, no, sir.

Q. Do you ever recall Mr. Johnson's telling you to go look for books and records called for in a Government's subpoena? A. I don't recall, no, sir.

(147) Mr. Bjork: I have no further questions at this time.

Cross Examination by Mr. Kleinman:

Q. Now, will you please be good enough and sit back and relax and talk as loud as you can.

When did you first go to work for Brakes, or any of the Brakes corporations? You know what I mean, don't you? A. Yes, sir.

Q. When did you first go to work? A. 1943.

Q. 1943? A. Yes, sir.

Q. And at that time how many corporations were there with the name of Brakes? A. In 1943?

Q. Yes. A. One.

Q. And what was that corporation? A. Brakes, Incorporated.

Q. Were there other corporations which had for a name the word "Brakes" and then something else after 1943? A. After 1943?

(148) Q. Yes. A. Yes, sir.

Q. Now, what were they? Will you name them, please? A. Brakes of New York, Incorporated; Brakes of Brooklyn, Incorporated.

Q. Yes. Then we had Brakes, Incorporated, is that right? Brakes of New York, Brakes of Brooklyn, Brakes Incorporated, is that correct? A. Yes, sir, that's right.

Q. Did there come a time when there was Brake Center, Inc.? A. Yes, sir.

Q. Now, can you think of any others? A. Brake Service Huntington Corporation.

Q. Brake Service Huntington did you say? A. Huntington Corporation.

Q. Huntington Corporation. These five corporations, did Mr. Johnson either own stock, if you know, or was he a director or was he an officer of these corporations? A. Any of these, sir?

Q. Well, was he an officer or director or was he a stockholder, first, in all the corporations? (149) A. Yes, sir.

Q. You told his Honor that you thought you were an officer of one of these corporations. Which one was that? A. Brakes, Incorporated.

Q. Brakes, Incorporated. But then you learned that you were not an officer of the corporation. You were told afterwards that you were not, is that right? A. Yes, sir.

Q. And I believe that that was with reference to the time that a Mr. Kennedy, a United States Marshal, came to Brakes, Incorporated, sometime in November of 1955 for the purpose of serving a subpoena duces tecum. Do you recall that? A. Yes, sir.

Q. Well, you remember a Mr. Kennedy, do you? A. I don't recall the name, sir.

Q. Well, a United States Marshal. A. Yes, sir.

Q. And he tried to effect service upon Brakes, Incorporated, in November of 1955? Do you recall that? A. Yes, sir.

Q. Now, was it at that time that you telephoned counsel in this case? (150) A. Yes, sir.

Q. That is when you spoke to me, is that right? A. Yes, sir.

Q. You knew, did you not, that Brakes, Incorporated, had been dissolved in April of 1955 at the latest? You knew that, didn't you?

Mr. Bjork: I am going to object to the form of the question.

Mr. Kleinman: Well, I am trying to save time, your Honor. And if he wants to hold me down to it and I will prove it perhaps without leading, but these are matters of proof already. Maybe we can have a stipulation.

Mr. Bjork: Maybe I can stipulate to it.

Mr. Kleinman: No, we have on the record already, to which I have stipulated, that they were dissolved.

The Court: I think perhaps it would be better if you don't lead. Let's see how it works out.

Mr. Kleinman: Very well.

Q. Do you know when this Brakes, Incorporated, was dissolved? A. I knew it went out of business in October 1954 and was dissolved shortly after that.

Q. (151) Q. When this United States Marshal came to you to serve Brakes, Incorporated, with a subpoena duces tecum, you knew that that corporation was dissolved, didn't you? A. Yes, sir.

Q. Did you tell him so? A. I think so.

Q. Did you suggest to this United States Marshal that he telephone me at that time, if you can recall?

Mr. Bjork: I am going to object to the question.

Mr. Kleinman: This may seem laughable, and I had a talk with Mr. Kennedy, and if there is a marshal by that name I will bring him here, subpoena him.

The Court: I think Mr. Bjork's objection is to the form of the question.

Mr. Bjork: The form of the question.

The Court: You are leading us to the conversation.

Mr. Kleinman: Yes. I noticed the difficulty. Mr. Bjork had before on direct examination and this is cross, your Honor.

The Court: I know. I don't think he asked (152) about his—well, I guess he did ask about his—go ahead.

Mr. Kleinman: Yes.

Q. Do you have any recollection of the talk that you had with this United States Marshal at the time he attempted to serve the subpoena duces tecum? A. Yes, sir.

Q. What was the conversation you had with him?

Mr. Bjork: I have no objection, your Honor, on the ground of hearsay, but in view of the fact that Mr. Kleinman's objection was on the very same ground I think it should be one way or the other.

Mr. Kleinman: Well, your Honor overruled it.

The Court: Go ahead. Go ahead.

Mr. Kleinman: You may answer.

Q. The question was, if you don't remember it, do you remember the conversation you had with the United States Marshal with respect to the service of a subpoena duces tecum? A. I remember asking him to speak to the attorney or he possibly might have spoken to either you or Mr. Shapiro at the time. I am not sure. I know that either one of you talked to him, I think.

Q. While you were employed by one or more of (153) these corporations with offices at West 35th Streets, was all the business of these various corporations including

the name Brakes that I have asked you about before performed out of the office at West 35th Street until there was a move to some other place? A. Yes, sir.

Q. And were you the head bookkeeper for all these corporations? A. The last few years before moving, yes, sir.

(154) Q. Then there came a time when there was a move from Manhattan to Queens, is that right? A. Yes, sir.

Q. And did all the corporations then in existence move from Manhattan to Queens? A. Yes.

Q. And were you then the bookkeeper for these corporations? A. Yes.

Q. How many were there, if you know? A. With the name Brakes in it, sir?

Q. Yes. A. Brakes, Incorporated, Brakes of New York and Brakes of Brooklyn, Incorporated.

Q. I understand from the testimony of the last witness that there was an office in Brooklyn, in the Borough of Brooklyn? A. Yes, sir.

Q. Was that during the time that you had your office in Long Island City? A. Yes, sir.

Q. You gave testimony before of filing certain papers and looking for certain documents. Did these (155) papers and documents refer to all the business of these various corporations or only to government papers and documents? A. No, all the business.

Q. Now do you recall there came a time when an action was instituted by Bendix-Westinghouse against Brakes, Incorporated? Do you remember that? A. Yes, sir.

Q. Do you remember when that was, when that action was started? A. To the best of my recollection the early part of 1954.

Q. And that was quite awhile before this gentleman, the marshall came to serve a subpoena upon Brakes, Incorporated, was it not? A. Yes, sir.

Q. Now during the course of that action of Bendix-Westinghouse against Brakes, Incorporated, do you recall

there came a time when representatives of Bendix-Westinghouse came to the office of Brakes, Incorporated, to look at books, documents, records, etc.? A. Yes, sir.

Q. And is that the time when you say that you (156) recall a file on the floor with government contract or contracts in it? A. This would be in Long Island City?

Q. Well, I don't know when it was. You told us that there was a time when you saw a file on a floor and Mr. Bjork was asking you about government contracts; do you remember that? A. Yes, sir.

Q. Now where was this—I withdraw that.

On what occasion do you recall seeing the file on the floor with some government contract or contracts in it?

(No response.)

Mr. Kleinman: Well, may I ask another question which might clarify it since the witness seems hard put to give an answer.

Q. Can you tell us the occasion that you refer to, in answer to Mr. Bjork's question—was that during the course of this litigation between Bendix-Westinghouse and Brakes, Incorporated? A. I believe so, sir.

Q. I asked you—I am not sure, as I recall it—whether or not there were any people from Bendix-Westinghouse (157) in the office of Brakes, Incorporated? A. I believe so.

Q. Do you recall photographs being taken in your office of certain records and files of Brakes, Incorporated? A. Yes, sir.

Q. Was that done by the representatives of Westinghouse—representatives of Bendix-Westinghouse? A. Yes, sir.

Q. Was that the occasion when all the files and records of Brakes, Incorporated, were submitted to the inspect-

tion of these gentlemen from Bendix-Westinghouse? A. Yes, sir.

Q. How long a period of time did these men from the plaintiff, that is, Bendix-Westinghouse in that action, remain in the office examining and taking photographs and looking into the files of Brakes, Incorporated? A. Well, I recall it was quite some time.

Q. Well, can't you give us in terms of days or weeks? A. I can't.

(158) Q. Well, was it just one day or two days or one week or two weeks? Can't you remember that? A. A number of days.

Q. Now, can you tell us whether that was at West 35th Street or in Long Island City—can you tell us that? A. West 35th Street.

Q. Now you were asked some questions as to whether or not you had a conversation with Mr. Johnson in regard to the material requested in the subpoena duces tecum concerning books and records relating to United States Government contracts, and then mentioning certain numbers of contracts.

Do you recall a question being put to you by Mr. Bjork whether you spoke to Mr. Johnson about the subject matter of the subpoena duces tecum? A. Yes, sir.

Q. And then Mr. Bjork asked you whether you were directed by Mr. Johnson to look for the books and records called for by the subpoena duces tecum. Did you have some conversation with Mr. Johnson about it? A. Yes, sir.

Q. After the service of the subpoena duces tecum? A. Yes, sir.

(159) Q. And does that go back to the original service of the subpoena duces tecum, which was in 1955, in November? A. I don't recall the details at that time.

Q. No, but did you have a talk with him about these

books and records called for by the subpoena—that is what I want to know. A. Yes, sir.

Q. Now you have been with Mr. Johnson for years, isn't that right? A. Yes, sir.

Q. Did he ever give you formal directions and formal orders, "Do this, do that?" Were you ever so informed? Did he ever say that to you? A. No, sir.

Q. Well, you knew that these books were required by the government, didn't you? A. Yes, sir.

Q. Did you look for them? A. Yes, sir—well, now I remember some records in your office.

Q. In whose office? A. In your office.

Q. That is right. (160) A. It comes back to me that I had to look for those.

Q. Did you look for records and did you find records? A. Yes, sir.

Q. What did you do with those records that you found? A. I readied them—I made them ready to be sent to you.

Q. Well, you see, I am trying not to lead you, but when you say you made them ready, just what did you do, please? A. Well, I looked for them.

Q. After you looked for them and after you found some books and records and documents, what did you do with them? Did you throw them out of the window, Mrs. Hammerstein? A. No, sir.

Q. Did you tie them up in a package? A. I might have.

Q. Well, did you bring them to my office? A. No, sir.

Q. Do you know who brought them to my office? A. No, sir.

(161) Q. Did you send them to my office? A. (No response.)

Q. Well, in any event you just assumed they got to my office, is that right? A. Oh, I know they did. I saw them.

Q. Did you see them there? A. Yes, sir.

Q. Oh, good.

You have appeared before this Grand Jury recently within the past few days or past week or two, have you not? A. Yes, sir.

Q. And have you been shown books, records, documents of Brakes, Incorporated, before the Grand Jury? A. One or two documents. No books or records.

Q. And after you had first appeared before the Grand Jury you say that Mr. Bjork directed you to look for books and records and documents of Brakes, Incorporated, is that right? A. Yes, sir.

Q. And as a result of that did you find some other records? A. Yes, sir.

Q. Where did you find those? (162) A. In a small room upstairs.

Q. Upstairs where, please? A. Upstairs in Long Island —over the Long Island City office.

Q. And did you produce them? A. Well—

Q. Did you give them over to Mr. Bjork? A. Not personally.

Q. Did you give them over to Mr. Johnson? A. Yes, sir.

Q. Then you have seen them here after Mr. Johnson produced them, is that right? A. Yes.

Q. Now with respect to government contracts, do you know when Brakes, Incorporated, first started doing business with the government? A. No, sir.

Q. Do you know when it stopped doing business with the government? A. Well, by conversations I have heard.

Q. All right, tell us what you have heard even by conversations—when was that? A. Well, the exact dates I heard—

Q. No, not the exact dates. (163) A. I mean the closest I heard today, in court.

Q. When? A. In 1954.

Q. Did you yourself have anything to do with preparing these contracts or did the government prepare con-

tracts and send them in to Brakes, Incorporated, if you know? A. I know nothing about the contracts.

Q. Did you have anything to do with the preparation of these contracts? A. No, sir.

Q. Or the preparation of any other documents relating to these contracts? A. No, sir.

Q. You heard the testimony of Mr. Jaegeler? A. Yes, sir.

Q. After Mr. Wittman left the corporation, we understand from Mr. Jaegeler that he took over Mr. Wittman's job. You heard him say that? A. Yes, sir.

Q. Is Mr. Jaegeler the man who was in charge of the the government business between Brakes, Incorporated, and the government, if you know? (164) A. Well, I heard it today.

Q. Did you have anything to do with the actual filing of any papers that had to do with the government? A. No, sir.

Q. Who was in charge of that? A. Well, we had invoices in the offices, and the girls took care of that. Any one of the girls could have done that.

Q. Is it fair to say that there were thousands of invoices for government and non-government business? A. Yes, sir.

Q. You mean at any time anybody purchased something a bill or invoice was made out, is that right? A. Yes, sir.

Q. If a man came in to buy something, 80 cents' worth from Brakes, Incorporated, would he get a bill or an invoice? A. Yes, sir.

Q. And do you know the total volume of business that Brakes, Incorporated did over a period of a year? A. Approximately.

Q. Approximately how much? A. $500,000 a year.

(165) Q. And they represented small purchases as well as large purchases, is that right? A. Yes, sir.

Q. Can you give us any approximation of the number of customers that Brakes, Incorporated, had over the period of one year? A. I could tell you approximately over a month.

Q. Or over a month, how many? A. Several hundred—a good many hundreds.

Q. Did you say "several hundred"? A. Many—I mean several hundred, yes, sir.

Q. Several hundred a month? A. Yes, sir.

Q. Did Mr. Jaegeler have a desk in the same office where you had your desk? A. No, sir.

Q. Well, let me first suggest to you—on 35th Street first. A. No, sir.

Q. Now let us get to Long Island City, as to that did he have a desk in the same office with you? A. No, sir.

Q. Of course when he moved over to Brooklyn you did not see very much of him after that, did you? (166) A. No, sir.

Q. Do you remember the time Mr. Wittman left the corporation? A. Yes, sir.

Q. Do you remember when Mr. Wittman left the corporation? A. Some time in 1952.

Q. Was he an officer of the corporation? A. Yes, sir.

Mr. Kleinman: I have no further questions, your Honor.

Redirect Examination by Mr. Bjork:

Q. Mrs. Hammerstein, directing your attention to the time when the United States Marshall came to the Queens Boulevard address, was there any other person there at the time he came to the office? A. I think so, yes.

Q. Who was there? Was Mr. Johnson there? A. No, sir.

Q. Was there any other officer of the corporation there?

Mr. Kleinman: Now I object to this, if your Honor please. The Corporation was dissolved, there couldn't have been an officer of the corporation, (167) of a dissolved corporation.

The Court: Overruled.

A. I have answered the—Mr. Johnson was not there.

Q. Was Mr. Libby there? A. Not in the office, no.

Q. In your employment with Brakes, Inc., were you also the office manager? A. Yes.

Q. Now with respect to the storing of records you stated that the current records, after you moved—directing your attention now to the time that you moved from West 35th Street to Long Island City, did you continue to store very recent years on the main floor, of your general records? A. Yes, sir.

Q. So that records for 1954 and 1953 would still have been on the main floor, is that correct? A. I am not sure about 1953. The system was changed because of difference of space, so I am not sure about 1953.

Q. But you are sure about 1954? A. Yes, sir.

(168) Q. At the time the people from Bendix-Westinghouse, referred to in Mr. Kleinman's questions, came to Brakes, Incorporated, looking over documents, did you turn over any documents to them or did they just take photographs? A. There were a lot of records turned over to Haskins & Sells.

Q. And did you get them back from Haskins & Sells? A. Not personally, no.

Q. Do you know whether they came back to the plant? A. I know of records coming back, yes.

Q. Did you make any record of what documents you turned over to Haskins & Sells? A. Not a complete record, no, sir, I didn't.

Q. You made no record at all? A. Not in writing—I don't recall making a record in writing, sir.

Q. How else would you make a record? A. Mentally.

Q. Do you have any knowledge now of what you turned over to Haskins & Sells? A. I would have to go into guesses.

(169) Q. I don't want you to guess. Any of the documents that you turned over to Haskins & Sells, were they burned in any way, charred? A. Before or after?

Q. Before or after what? A. Before or after they were turned over?

Q. Well, at the time that you turned over these records to Haskins & Sells, did you notice any of the records showing evidence of having been burned? A. I don't recall seeing that they looked burned.

Q. And at the time when you turned these over to Haskins & Sells, was it not in 1955?

Mr. Kleinman: Your Honor, I would like to help the Court on that because there is a record of the date, but I don't have that file with me. It is a recorded fact, but I am sorry I don't know just when it was.

Mr. Bjork: I will withdraw that question.

Q. Mrs. Hammerstein, do you know whether or not the suit had been settled by the time you moved to Long Island City? A. I don't know it for a fact, no, sir.

Q. What is your best recollection? (170) I believe it was not.

Q. And if I showed you—

Mr. Kleinman: If you will tell her when it was settled.

Mr. Bjork: January 27, 1955, is the order signed by—there is a stipulation signed by Hughes, Hubbard, Blair & Reed and William W. Kleinman.

Mr. Kleinman: Yes, I will admit that is a fact. I think we can put it on the record that that was the time of the settlement of the suit.

The Court: All right.

Q. Now subsequent to the January 27, 1955, date, the last part of January, did any people from Haskins & Sells come to inspect your books, if you know? A. I don't know the date of the—all I know is after the records came back from Haskins & Sells, whenever that was—I don't recall an occasion when they examined any book again but I couldn't place the date of when they were sent or when they came back.

Q. Subsequent to the time that the suit was settled—I will withdraw that.

Do you know whether or not the suit was settled, of your own knowledge? (171) A. Yes, sir.

Mr. Kleinman: What was the last question?

(Record read.)

Q. And subsequent to the time that it was settled do you recall people from Bendix-Westinghouse coming to the plant of Queens Boulevard? A. They did not.

Q. You are sure of that? A. Yes, sir.

Mr. Kleinman: I think, Mr. Bjork, perhaps you don't quite understand the terms of the settlement. I personally do not know whether they were at the plant after the settlement but according to the terms of the settlement, as I remember, so far as I recall Bendix-Westinghouse had the right to examine our products as well as our books and records for some period of time afterwards. That was one of the conditions of settlement. Now whether they availed themselves of that or not I cannot say is a fact.

Mr. Bjork: I have been advised, I will say this—it is not testimony but I have been advised that such an inspection was so made by reason of inquiry.

Mr. Kleinman: Yes, I am quite sure it must (172) have happened.

Q. And you stated previously, Mrs. Hammerstein, that you made no record of the books which were turned over to Haskins & Sells, is that correct, no written record? A. No, sir.

Q. And you gave them no receipt when they turned them back over to you? A. I think so.

Q. You think which, madame? A. I think there was a receipt in existence.

Q. Do you recall with whom you dealt at Haskins & Sells? A. No, sir.

Q. Do you recall in any of the books and records which you turned over either to Haskins & Sells, the representatives of Bendix-Westinghouse or the law firm of Hughes, Hubbard, Blair & Reed, that those documents which you had turned over included government contracts? A. I do not recall.

Q. Is it not a fact that you did not turn any such documents over to them? A. I do not recall the exact documents or records (173) or books that were turned over.

Q. Now, Mrs. Hammerstein, you stated, I believe, inadvertently, two things in answer to Mr. Kleinman. I would just like to try to clear it up if I may.

The books and records which the representatives of Bendix-Westinghouse inspected, where were they located? Was it at 35th Street or was it Long Island City? A. I remember one occasion very well on West 35th Street, but there might have been an occasion in Long Island City. I do remember the incident on West 35th Street.

Q. But at the present time you cannot recall any inspection being made at the plant in Brooklyn, is that correct? A. In Brooklyn?

Q. I am sorry, Long Island. A. There were some peo-

ple came over to Long Island City but I don't know who they were. They had something to do with the litigation. I couldn't say what. I don't recall any other occasion—well, except the one on West 35th Street when the pictures were taken and a lot of records were required—that is the only occasion that I remember more clearly.

(174) Q. Do you recall any such occasion in Long Island City as well? A. No, sir.

Q. Mrs. Hammerstein, you first went to Long Island City on a permanent basis around Labor Day of 1954, is that correct? A. Yes, sir.

Q. Now subsequent to the time that you went to Long Island City was Mr. Jaegeler ever situated at that same office with you? A. I don't recall he was, sir, no, sir.

Q. In fact he had moved to Brooklyn, had he not? A. We were not in the same office together. I remember that distinctly.

Q. So that you were just guessing, were you, when you said that Mr. Jaegeler did not have his desk in the office of Mr. Johnson, is that correct? A. Well, he never had with me.

Mr. Kleinman: I said "her office".

Q. So that at no time that you were in Long Island City did Mr. Jaegeler have a desk in your office, is that correct? A. That is right.

Mr. Bjork: You may inquire.

(175) Mr. Kleinman: I have no further questions.

By the Court:

Q. The records that you prepared for Mr. Kleinman, to whom did you give them? A. I do not recall, sir. I pre-

pared them as I presume they were taken over by one of the employees—I don't remember who took them.

Q. Did you give them to Mr. Johnson? A. No, sir.

Q. Do you recall what they consisted of? A. The best recollection I have in Mr. Kleinman's office—

Q. Not in Mr. Kleinman's office? A. No, sir.

Q. The records that you prepared— A. No, sir. I don't have a recollection of what they all were.

Q. Did you get them together yourself? A. I believe so, sir.

Q. Where did you get them? A. Somewheres in the building, sir.

Q. Well, think back now. Take your time. Where did you get these records together? A. I have a cabinet in the office where I keep (176) books, which I still have, this cabinet—and I might have taken some out of that cabinet and some—and that would go for a general ledger which I kept pretty close to myself, usually for more than one or two years, and then possibly upstairs in a little room—I must have taken out some, but for sure I couldn't say possibly—I don't have any recollection for sure where I took them from.

Q. What is your best recollection where you took them from, then you can tell us whether it is for sure or not.

As you sit here now, try to think back. Do you have any recollection of getting those books together? A. Not exactly where I took them from.

Q. Do you recall the incident? A. Vaguely, sir, yes.

Q. All right, what is your recollection, tell me what happened; tell us the whole transaction. A. Some books were asked for. I don't recall who asked me. I presume it should have been Mr. Johnson. I don't recall. I just can't seem to remember the exact location and the occasion of it. I know I got books together but I can't exactly remember the occasion.

(177) Q. Can you remember what you did first or how it happened? A. No.

Q. Do you remember where you got them together? A. Some place in the building, of that I am sure.

Q. Whereabouts in the building? A. I couldn't say exactly where I took them from. They could have been—they could have been either of several places. That's where—they would have been, since I got them together—they could have been in that cabinet, they could have been lying on top of the cabinets in the file room, which is almost the same as the office. They could have been in that upstairs room which I mentioned before, where I found records, and they could have been lying loose some place in the office, but exactly where I took them from, I couldn't say.

Q. Do you remember where you piled them up? A. No, sir.

Q. Do you remember what you did in your own office, whether you got them together in your own office? A. I am just so worn out I cannot think.

Q. Well, take your time. (178) A. I think I remember having them wrapped up, possibly, but that's as far as I can remember, in brown paper possibly—they were wrapped up in heavy twine—that is about as much as I can remember.

Q. Remember where that was done? A. No, sir.

Q. Now, can you tell me what books you had wrapped up, what books did you get together that day? A. I can't say the exact records, I mean what keeps coming back to my mind is that I remember being in the office, in Mr. Kleinman's office afterward—

Q. No, let us not think about his office afterward. I am thinking about Long Island City, and I want you to think about Long Island City. That is where you got the books together. A. Yes, sir.

Q. Now I want you to tell me what books you got together that day. A. I just cannot remember.

Q. You remember what books you looked for that day? A. The whole set of books, so far as I remember—whatever duties were given to me.

The Clerk: Would you like a glass of water (179) (handing)?

The Witness: Thank you, sir.

Q. Can you tell me what books you looked for? A. I think it was the whole set of books, which would consist of the general ledger, the sales journal, the cash journal, the general journal.

Q. Now were there supporting records for the general journal—I mean for the general ledger? A. General ledger, yes, sir. Well, the sales journal and the cash journal and the general journal.

Q. And the general journal? A. Yes, sir.

Q. And what ledgers did you keep? A. Accounts receivable subsidiary.

Q. Did you look for that? A. I don't recall, sir.

Q. Wouldn't you ordinarily look for that if you are asked for a complete set of books? A. Yes, sir.

Q. Do you recall looking for it? A. No, sir.

Q. How did you keep your subsidiary ledger? A. Since 1948 there was a Burroughs bookkeeping machine and there were trays for cards in that, and (180) the cards, in alphabetical order, were subsidiary accounts receivable ledger.

Q. Then as those cards became old, would you still keep them in the tray? A. There was an inactive file of accounts receivable, ledger cards. If the companies went out of business or for various reasons—

Q. Well, in 1954 with respect to a transaction which

ended in 1954, where would those accounts be kept? A. 1954 would be in those two trays.

Q. In other words, if you looked for the subsidiary ledger cards relating to the government contracts— A. Yes.

Q. —in 1954 they would be in those trays? A. Yes, sir.

Q. Now in 1955 where would they be? A. Most of them still would be in that tray except bankruptcies, etc.

Q. If a company went out of business you took it out of the tray? A. Not immediately but when I thought of it, when I came across it.

(181) Q. In 1956, would the 1954 transactions still be in those trays or out? A. Oh, if an account was very active and had several cards I would keep, let us say, six months to a year in the current tray and then if they were accounts that had five or six pages I would just keep the last one or the one previous to that and the other ones would go into the inactive file. There is a drawer that holds inactive files.

Q. And if a transaction—in other words, if you completed business with the government or any other customer in 1954, how long would those accounts stay in your active trays? A. Well, there would be no particular time but I mean since I have a lot of different—a lot of work, if I had a chance and when I would take off an accounts receivable schedule, then I would come across one and had a lot of cards that we were not having current, I would keep taking them out alphabetically and have them in a file, put into the inactive tray.

Q. I see. You kept the inactive tray alphabetically? A. Yes.

(182) Q. You did not keep it by years. In other words, you had alphabetically cards in your inactive drawers going back to different periods of years, depending on how old your account was. A. Yes.

Q. Now do you ever recall transferring any ledger accounts with respect to government work? A. I could have taken out an old card and put it in there.

Q. Do you have any recollection of it? Did you have an account with the United States Government or anything like that? A. We had cards with the United States Government, yes.

Q. And do you recall where they were, in which set of files, with the active tray or the inactive tray? A. Well, they should have gone into the inactive, some of them should have gone into the inactive tray but—could I explain something?

Q. Surely, go ahead. A. This system that I am explaining to you now has been used by Brakes Center for the last few years now. I am speaking of the setup—sometimes—(183) I am not sure whether I have the exact setup at the time but I believe so, but in the actual drawer that I am thinking of right now—and I know where it is in my mind right now—I neglected a lot of clerical work for a long time and I don't think anybody else did these little things because I used to come across them myself.

Now I don't know whether it was just done that way all the time. I don't remember having such a drawer at the time. It may have stayed in the tray for longer than that before that.

Q. Before they were transferred to the inactive file? A. Yes, that is the practice I have now,—exactly how it was treated at that time, I would say the same way.

Q. Now if I asked you to get a complete set of records with respect to your transactions with the United States Government— A. Yes, sir.

Q. —would you look in both drawers? A. Yes, sir.

Q. And what other records would you get? (184) Would you look to your invoices, too, or would they all be posted? A. All invoices would be posted to that card or cards.

Q. Were there any journal entries besides—were there journal entries that they were posted to before they went to the ledger cards? A. No.

Q. If my bookkeeping is wrong, you tell me. A. No. The general entries—the procedure with the bookkeeping machine is such that all customers are put in alphabetical order. When a batch of invoices is ready for filing or when a girl has the time, a tape is taken and then she proceeds to stuff it, as we call it, into those trays, and after she finishes. she double checks whether the tape coincides with her two sub-totals she has just posted in her sales journal.

Q. You post your invoices into the sales journal? A. And on the card.

Q. And on the ledger card at the same time? A. At the same time as the carbon.

Q. And what did you do with the invoices then? A. After they are posted the girl that posts them (185) put her initials on them and they are filed whenever she gets a chance to or whenever anybody else gets a chance to, which should be in days.

Q. You filed them by customer? A. Alphabetically by customer, yes, sir.

Q. Then where are they now? A. In metal files, sir.

Q. In metal files? A. Yes.

Q. And then as they got older what do you do? A. After the first of the year, as a rule they—they get taken out of the metal files and put into trans files.

Q. And then you store them in the trans files? A. Yes, sir.

Q. And where are they stored, the metal files—are they right in the file room, is that right? A. Yes.

Q. Are the trans files in the file room, too? A. Not the last few years. You see, there is a lack of space involved here and it isn't just so consistent all the time, but as a rule the trans files would be in a separate place. In New York, when we were in New York, there was more space.

The (186) metal files were closer to us and then the trans files of prior years would be a little further away, where there was an enclosure.

Q. Now if I asked you for all of your records of your sales to the government, or on your work for the government, would you get the invoices, too? A. Yes, sir.

Q. So, in other words, a complete set of records would include the journals, the ledgers and the invoices? A. Yes, sir.

Q. And the ledgers would include both the general ledger and the subsidiary leuger cards? A. Yes, sir.

Q. On both the inactive and active files? A. Yes, sir

Q. Now what I want you to do is to think back to the day when you got those records together, as to whether you looked for each of these particular records, how you did it and what you found. A. Well, whatever I could find, I got together, I was told to do that.

Q. All right, try to think back and tell us how you did it and what you actually found. (187) A. I don't know whether it is just now but it seems to become blank. I cant' piece the occasion together. Something comes to my mind about paper and twine and that is about the only thing I can think of in bulky things.

Q. Can you remember from looking at these various documents? A. You see, in my mind I get so confused between the time of 1954 when I kept looking and looking for things. Everything was all around. I can't keep it apart between 1954 and 1955. It seems in my mind I was looking for things.

Q. When did you get things together for Mr. Kleinman? Was that 1954 or 1955? A. I imagine 1955.

Q. 1954 was the— A. The Bendix business.

Q. —the Bendix business? A. Yes. My mind is forever moving in the office, and it just seems so—it was extra work for me and I was already pressed for time that

I tried to keep things together. It was a very difficult time for me. It is difficult to remember things.

Q. Now see if you cannot get that 1955 occasion (187A) back. A. I just didn't give it so much thought. I can't recall the exact occasion.

Q. Let me ask you this; do you recall in your recollection of that occasion, however vague it may be, do you have any recollection that any of these records were missing at that time? A. I think so.

(188) Q. What do you recall in that respect? A. Well, I remember having a difficult time of finding what I did. That part I remember. So that I would say there were things missing because I was looking and looking. Then I sent whatever I had.

Q. Do you recall where you looked, or do you recall any particular instance of that difficulty that you seem to have a general feeling about? A. It could have been that I looked upstairs because—

Q. Well, what would be upstairs? A. There are records upstairs.

Q. What records do you keep up there? A. There are transfiles up there and that is where I found some records a few days ago that had sunk into a transfile and it was barely visible unless you stood up on a chair.

Q. What would have been up there in a transfile in 1955? A. Old records.

Q. How old were these records that you were looking for?

Mr. Kleinman: May I suggest, your Honor, I have it here?

(189) The Court: Just a minute.

A. Several years back, sir.

Q. It did go back several years? A. They weren't current.

Q. Would the 1954 records be up there? A. Now?

Q. No, in 1955. A. In 1955 there should have been records up there, yes. Anything that wasn't the same year that was around should have been there.

Q. Do you have any recollection now? I dive't you to asking you what could have been, then I come back and ask you what you recall. Just take your time. I am not trying to confuse you in any way. Now go back to what you recall. A. I would say that it might have been up there because I remember getting dirty.

Q. You remember getting dirty? A. I think I put on a coverall of some kind.

Q. Do you remember anything else about this situation? A. I can't keep one occasion apart from another. That is why it is so difficult for me to say. I can't just—I can't recall anything else.

(190) Q. Do you remember any ledger cards being missing? A. I think so.

Q. Now, where would they be missing from? A. It is too hazy. I just can't go any—think any more.

Q. You think I have gotten all the recollection you have of this occasion? A. Certainly. Sure, sir.

The Court: All right. Anything else?

Mr. Bjork: One question, sir.

By Mr. Bjork:

Q. Mrs. Hammerstein, in answer to Mr. Kleinman you said that Mr. Jonnson never directed you to do anything. Is that correct? A. Well, I thought he said ordered me or something like that.

Q. Well, I don't want to quibble on words. A. I don't remember exactly. I am sorry.

Q. Did Mr. Johnson ever tell you to go look for the books and records in 1955? A. I believe he asked me.

Q. Do you recall when he asked you? A. Several times.

Q. And what did he say to you? (191) A. "Are there any records?"

Q. And that is what you mean when you say he asked you to go look? A. Yes, sir.

Q. Subsequent to May 3, 1957—that is just this month—did Mr. Johnson ask you to go look for records called for in a Government's subpoena? A. He also asked me—

Q. Well, I don't—did he ask you to go look for them? A. He asked me whether there were any records.

Q. Is that the same thing as asking you to go look for them, Mrs. Hammerstein? A. Well—

Q. Did you in fact after you spoke to Mr. Johnson go look for books and records? A. No, sir.

Mr. Bjork: I have no further questions.

Mr. Kleinman: This may take a little while. When does your Honor intend to stop?

The Court: I will stay until 4:30. The only question in my mind is whether the witness would like five minutes.

Mr. Kleinman: I think I can get through in a (192) few minutes, your Honor.

The Court: Do you want to step down a few minutes?

The Witness: I don't fell too good generally.

The Court: Whatever you think you want to do. Mr. Kleinman has got a few more questions. Do you want to step down or do you want to finish?

The Witness: I don't know how long it will take. I don't know myself.

The Court: You go ahead, Mr. Kleinman

Mr. Kleinman: The only reason I am asking, your Honor, is I think that this will be continued on some other occasion after we get through this afternoon.

The Court: Yes.

Mr. Kleinman: And I do have a rather important appointment, but it is across the street at 4 o'clock.

The Court: Oh, I didn't understand that.

Mr. Kleinman: Since we were going to have to meet again, I was going to make some arrangements to have some other lawyer take my place because I believe I will be engaged.

The Court: Next week?

Mr. Kleinman: On Mon perhaps a month. (193) But I don't want to ain your Honor nor this cause.

The Court: I will stay, Mr. Kleinman, as long as you want; so you go ahead, and if the witness can answer your questions before you go across the street, fine.

Mr. Kleinman: Well, I hate to press her now; she seems a little weak and feeble.

The Court: Well, all right, you go ahead. If you feel tired, why, you tell us.

By Mr Kleinman:

Q. I am wondering, Mrs. Hammerstein, if you can recall the time after you found whatever books and documents and records you did find in November of 1955—I think you told his Honor that you have some vague, hazy recollection of brown paper and twine. Did you say that? A. Yes, sir.

Q. And did you mean by that that your hazy recollection is that you tied up these books, records, documents, or whatever they were, in this brown paper and twine? A. Not myself, but something comes to my mind as far as that is concerned.

Q. Did you say that later you were at my office (194) after the delivery of these books or papers and documents to my office? A. Yes, sir.

Q. Yes. And at that time do you recall being questioned in regard to what you could find and what you did find? A. Yes, sir.

Mr. Kleinman: May we have the original which is the—

Mr. Bjork: The first one?

Mr. Kleinman: Yes, the first one (handed)

Q. I show you Government's Exhibit 1 and I call your attention to the items numbered from 1 to 7. Now, will you hold that, please (handing)? You remember, do you not, that this was the subpoena duces tecum originally left or delivered or served in November of 1955? Do you recall that? A. Yes, sir.

Q. Yes. Now, with respect to sales and purchase invoices in connection with Government contracts DA-20-113-ORD 9981 awarded to Brakes, Incorporated, 6-30-52—representing June 30, 1952—could you find that original contract? A. I think I looked for that.

Q. Well, could you find it, if you recall? A. No, sir.

Q. Then with respect to sales and purchase invoices, do you remember whether you did or did not find any sales and purchase invoices? A. I did not.

Q. Now, with respect to the inventory records, did Brakes, Incorporated, ever keep any perpetual inventory? A. I never saw one.

Q. Could you find any inventory records? A. No, sir.

Q. Now, with respect to production records, did Brakes, Incorporated, ever keep any production records? A. Not to my knowledge.

Q. Now, with respect to cash disbursements journal, cash receipts journal, were such books kept by Brakes, Incorporated? A. Yes, sir.

Q. And did you find some documents that related either to that particular Government contract that I called your

attention to, or Government contract generally? Did you find such ledger and journal? (196) A. I just found general books. Nothing pertaining to that contract.

Q. But whatever general books you found in connection with Brakes, Incorporated, pertaining to Government work or non-Government work, are those the documents that you turned over to Mr. Kleinman's office? A. Yes, sir.

Mr. Kleinman: All right.

The Court: Did you—I didn't mean to interrupt you—did you take them to the office?

Mr. Kleinman: No, she didn't.

The Witness: Not personaliy, no, sir.

Mr. Kleinman: No. They were in my office, as a matter of fact, when we were having the discussion.

The Court: I see.

Mr. Kleinman: It looks like I will have to become a witness here very shortly.

The Court: No, I don't think so.

Mr. Kleinman: I might say, your Honor, that I have already been a witness before the grand jury. He served me with a surprise subpoena yesterday.

The Court: I think you will manage to keep your balance.

(197) Q. Now, with respect to general ledger and general journals, did you find some of Brakes, Incorporated? A. Yes, sir.

Q. Which you think you wrapped up or which were wrapped up? A. Yes, sir.

Q. And how about sales journals? A. I believe so.

Q. Did you find any sales journal or sales journals? A. I believe so, sir.

Q. Did you find any purchase journals? A. No, sir.

Q. All right. Now, with respect to receipts, memoranda, correspondence, relating to above contract—and that is the

one that I called your attention to before—did you find anything with the exception perhaps of correspondence, if you can recall? A. I do remember now that I was looking for a contract. Before that I couldn't quite place it and I now remember it one time, and that must have been the occasion, I was looking for a contract and I looked all over and I couldn't find anything pertaining to such a number.

(198) Q. Yes. Well, may I put it then in a word now. Whatever you did find either in relation to these items from 1 to 7, whether they refer to that particular contract or not, is it your best recollection now that these were tied up to be delivered to Mr. Kleinman's office? A. To the best of my recollection they were tied up.

Q. Yes. A. And prepared for your office.

Q. All right. And then did Mr. Kleinman question you as to whether or not you could find anything else or whether you looked for anything else?

Do you recall being questioned about that? A. Yes, sir.

Q. Well, now, did you then state to Mr. Kleinman that you have tied up or caused to be tied up all that you could find in regard to this subpoena? A. I am sorry, sir; I remember the conversation more clearly not with yourself but with a gentleman, a tall gentleman in your office.

Q. In my office? Well, that may do. What was the conversation? A. Well, just what you said. There were some (199) questions and I did bring everything that I could find.

Q. But you personally didn't bring the bundle or bundles, whatever it was? A. Oh, no, sir.

Q. But you came after the bundles were delivered, if you recall, is that correct? A. Yes, sir.

Mr. Kleinman: I have no further questions, your Honor.

Mr. Bjork: Just one question, sir.

By Mr. Bjork:

Q. In answer to one of Mr. Kleinman's last questions, Mrs. Hammerstein, you said that you found some correspondence; is that correct? A. No, sir.

Q. You found no correspondence? A. I didn't recall finding any correspondence, no, sir.

Q. So that if you answered Mr. Kleinman that you found some correspondence, that was in error, is that correct? A. I meant to say that whatever I found I took with me.

Q. And you recall finding no correspondence at (200) all, is that correct? A. I don't recall, sir. I don't recall whether there was any correspondence and whether anything was found. I don't recall that. But whatever I did find pertaining to the order I took with me—I mean I had rather—I had it prepared to be taken.

Q. And to the best of your recollection did you find any correspondence at all? A. I don't recall that, no, sir.

Mr Bjork: I have no further questions.

The Court: Do you have any further questions?

Mr. Kleinman: No, I have no further questions.

The Court: All right, you are excused.

(Witness excused)

Tuesday won't help you any more than Monday, I gather?

Mr. Kleinman: I will know more definitely on Monday what my position is. So if your Honor will be good enough to put it over to sometime after Monday, if I should be engaged I will see that other counsel appears, or perhaps I could appear if I can get off, although I doubt that I will be able to get off then.

The Court: Have you got some more witnesses, Mr. Bjork?

(201) Mr. Bjork: Just a small amount, sir. Not really anything substantial.

The Court: I am just thinking in terms of number of witnesses, whether it would be inconvenient. Because if you are going to have to withdraw, we might as well go ahead on Monday and get it finished up.

Mr. Kleinman: What I was hoping to do, your Honor, I have alread spoken to my office associate, Mr. Price—(laughter)

I thought you might assume that at this time. He will come to my rescue.

(The Clerk confers with the Court.)

The Court: All right, I will put this over to Tuesday, Mr. Kleinman

Mr. Kleinman: All right.

The Court: That will give you a chance to turn around.

Mr. Kleinman: I will make some arrangement.

The Court: And the grand jury is going to continue to sit.

Mr. Bjork: Yes, sir.

I have some substantial briefs to submit to your Honor by Tuesday anyway.

The Court: By this time I have lost track (202) of the submission of briefs.

Mr. Kleinman: I have given you two.

The Court: I have two from you.

Mr. Kleinman: I have given Mr. Bjork copies.

Mr. Bjork: I have reference to Contempt of Congress cases.

The Court: Oh, I see. That's the point.

Mr. Bjork: Yes, your Honor.

The Court: All right, we will put this over until Tuesday at 2 o'clock.

(Adjourned to Tuesday, May 21, 1957, at 2 p.m.)

(203) New York, May 21, 1957,
2 P.M.

Before:

HON. LAWRENCE E. WALSH,
District Judge.

(Hearing resumed.)

Mr. Bjork: Mr. Harold Kraus.
The Court: All right.

HAROLD KRAUS, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Bjork:

Q. Mr. Kraus, by whom are you employed, sir? A. The Internal Revenue Service.

Q. Sir, in answering would you try and keep your voice up so that everybody at the table can hear you? (204) A. Yes. The Internal Revenue Service.

Q. And in what capacity are you so employed? A. Internal Revenue agent.

Q. With the United States? A. With the United States Internal Revenue Service.

Q. And how long have you been so employed? A. Perhaps 20 years.

Q. Have you accounting training, sir? A. Yes, sir, I am certified in Washington, D. C.

Mr. Kleinman: Would you keep your voice up?

A. I am certified in Washington, D. C.

Q. In the course of your official duties did there come a time when you conducted an audit of a corporation known as Brakes, Inc.? A. Yes, sir.

Q. To the best of your recollection when did that take place? A. Well, the date of the report is January 13, 1956, and the—

Q. Do you recall whether that report was made after the visit or contemporaneous with the visit? A. The report may have been shortly after the visit because it took time to requisition the loss year.

Q. And in what connection was this audit being (205) conducted? A. It was a routine examination of the 1953 return in conjunction with a tentative loss carry-back in which $300 was claimed on the basis of a 1954 loss carry-back to 1953.

Q. And would you tell the Court what you did in connection with that audit?

Mr. Kleinman: Well, your Honor, I must object to this upon the ground that it seems to be immaterial to our issue.

The Court: I will take it. You can move to strike it out.

Mr. Kleinman: All right, sir.

A. I had arranged with the representative Mr. Morris Schultz for a visit to the Queens—

The Court: I didn't get the name.

The Witness: Mr. Morris Schultz.

Q. Would you spell it? A. I think it is S-c-h-u-l-t-z. For a visit to their Queens office.

Q. Do you know who Mr. Schultz is? A. Mr. Schultz is the representative, is the accountant for Brakes, Incorporated.

Q. And what did you do with Mr. Schultz, sir? (206) A. Well, I had arranged to see him at the Queens office and I checked into the background of the taxpayer and determined that they had liquidated shortly before and that

there were large losses, and judging from the general situation I broke off the audit after an hour or two and determined that—

Mr. Kleinman: Well, I object to any conclusions that he made. This matter I submit is immaterial to our issue.

The Court: I will let him go on. As to those parts which may be immaterial we can strike out later.

Mr. Kleinman: I withdraw my objection.

Q. Without going into the results your audit in any way Mr. Kraus—I withdraw that.

Where did you conduct your examination? A. I conducted the examination at the Queens office of the company.

Q. And whereabouts in the Queens office if you recall? A. I think it was on Queens Boulevard. I am really not too sure of the address.

Q. Do you recall the physical structure in which you were operating? (207) A. Well, yes, the office was associated with the plant itself and I do recall it was one flight up, a long and narrow room, the office of the company.

Q. Did you have any conversations with Mr. Johnson? A. Well, I don't recall exactly. I vaguely recall that I was introduced to the officers of the company or the officer of the company.

Q. Do you recall what office Mr. Johnson was stated to hold? A. I don't recall the details of that introduction.

Q. Mr. Kraus, is there any standard auditing practice employed by the Internal Revenue Service with respect to examination of books of account? A. We have no specific audit program. The scope of the audit is left entirely to the examining agent.

Q. And in conducting this audit which you say took about two hours—is that correct, sir? A. Well, it took no more than that. It was of very brief duration considering the circumstances.

Q. Do you recall having any conversations with Mr. Johnson or Mr. Schultz wherein you requested records where you were told they had been destroyed in the fire? (208) A. To the best of my recollection I had not been told that records were not available.

Mr. Bjork. I have no further questions.

Mr. Kleinman: I have no questions.

The Court: All right.

Mr. Kleinman: Now, if your Honor pleases, your Honor took it subject to connection and I move to strike out this testimony, all of this testimony out, upon the ground that it has no materiality to the issue here before us. Mr. Krasus has not been able to assist us in determining what records were looked at and if there had been records available, and I submit that is not the issue before your Honor at the present time.

The Court: Well, if it were proved that the records were available at that time I certainly would not strike out the testimony at this time or at this stage of the proceeding anyhow, but my question is does this show that? In other words, all you have proved, as I understand it, is that he was not told that the records were unavailable.

Mr. Bjork: We are in the position of attempting to prove, your Honor—

The Court: Do I completely understand the (209) purpose of introducing this testimony?

Mr. Bjork: Yes, sir. We are attempting to prove the positive of the negative, that is, to get rid of what may be given as a reason for the non-produc-

tion of certain books and records which we have shown were in existence.

The Court: You realize that you have not as yet shown that such books and records were in existence by the testimony of this witness.

Mr. Bjork: That is quite right, and it is offered solely on the basis that if the books and records had been destroyed in a fire that this would have been one time when such a situation would have arisen and through Mr. Kraus' testimony we have attempted to prove that it did not arise at that time.

The Court: You have attempted to prove that this is one occasion when it would have arisen?

Mr. Bjork: Yes, sir.

The Court: All right. I will take the testimony.

Mr. Kleinman: May I remind your Honor that we have not offered any excuse for the unavailability of any of these records and that this issue as to the fire was brought in by the Government.

(210) The Court: I understand that Mr. Kraus' testimony is intended to demonstrate that he was not told that such records were unavailable, and I will let it stand to that extent.

Mr. Bjork: If your Honor pleases, during the course of the Grand Jury proceeding one of the stenographers testified to certain questions and answers put to Lawrence Johnson and I would like Mr. Kleinman's permission to introduce the transcription of the testimony which had previously been given on that date, which was I believe—

Mr. Kleinman: May 15th.

Mr. Bjork: —May 15th.

Mr. Kleinman: I thought this was in the record already but I may be mistaken about it.

Mr. Bjork: I believe that it is, and if it serves no useful purpose of the court I will withdraw my offer.

Mr. Kleinman: Well, as I understand it, this purports to be Mr. Johnson's testimony before the Grand Jury on May 15th, is that true?

Mr. Bjork: That is quite correct.

Mr. Kleinman: I think if that matter is already in, then I would have no objetcion to it.

(211) The Court: This is Grand Jury testimony of Mr. Johnson?

Mr. Bjork: Yes, sir, and this is other Grand Jury testimony.

The Clerk: We have some on the 14th and on the 7th.

Mr. Bjork: The testimony was given at a time prior to the institution of this contempt proceeding and, as a matter of law, I am not quite sure whether your Honor in reaching a determination in a contempt proceeding is permitted to go beyond the time when the contempt proceeding already began, and it is on that basis that I offer the testimony.

Mr. Kleinman: I am a little bit lost and I was lost about three minutes ago, but if your Honor would want to see all the testimony of Mr. Johnson, that he gave before the Grand Jury, I would have no objection to it.

The Court: All right. Under the circumstances I will take it.

(Marked Government Exhibit 8.)

Mr. Kleinman: Is that the only copy that you have?

The Court: Well, you may look at it first, (212) Mr. Kleinman.

Mr. Kleinman: It will take me about ten minutes to look at it, your Honor.

The Court: That is all right. You may look at it first. Is there anything else we can do in the meantime?

Mr. Bjork: Well, I have extracts from a deposition given by Lawrence H. Johnson on March 31, 1954, in an action brought by Bendix-Westinghouse Automotive Air Brake Company against Brakes, Inc. and Lawrence Johnson.

I have obtained Mr. Kleinman's oral stipulation that we can stipulate that if the witness Russell Bonynge, a notary public before whom this deposition was taken, had been called, that he would testify that this is an accurate reproduction of the stenographic minutes of that date.

Mr. Kleinman: Your Honor—

Mr. Bjork: If I have misstated it I will stand corrected.

Mr. Kleinman: I have agreed to stipulate with Mr. Bjork that if that person were called he would lay the foundation for the introduction of this deposition or that document as to the accuracy of the (213) document.

However, your Honor, I have read it, but I object to it upon the grounds, and I may as well state the objections now with reference to this transcript—

Mr. Bjork: There was not stipulation as to either materiality or relevancy.

Mr. Kleinman: I object to it on the ground of materiality and object further on the ground of remoteness. I believe Mr. Bjork stated that it was taken some time in 1954.

Mr. Bjork: March 31, 1954.

Mr. Kleinman: Yes. That was in a separate proceeding, a civil case. As a matter of fact I

submit that it has noting to do with the situation as it existed at the time of the service of the subpoena duces tecum and, according to Government's Exhibit 1, that was somewheres in or about the 25th or the 29th.

Mr. Bjork: The 25th.

Mr. Kleinman: The 25th of November, 1955. Upon those grounds I object to its introduction.

The Court: Well, I think I will take it, the only objection being one of remoteness, and as (214) far as prejudice I do not think it has any probative force whatever.

Mr. Bjork: I am reading from page 17 of that deposition:

"Q. Do you have invoices covering the sales? A. To everybody that we sell diaphragms.

"Q. Yes. A. We would have to go through volumes and volumes and volumes of records.

"Q. Do you have the invoices? "A. No, they are in the office.

"Q. By the office you mean this location on 35th Street? A. That is right.

"Q. All of your invoices are there? A. Yes.

"Q. How far back do your invoices go? A. How far back do they go? Do we keep them about five years or six years?

"(Discussion off the record.)

"A. (Continuing.) At least six years."

Mr. Bjork: Skipping to page 19.

"Q. Mr. Johnson, do I understand correctly that you have in your office in New York invoices covering all (215) of your sales of all types for approximately six years? A. That is right.

"Q. And that the invoices showing your sales

of Bendix-Westinghouse diaphragms would be mixed in with the total of the rest of your invoices for that period? A. You have a shining example right there of pretty much how our invoices are written. We very seldom if ever specify the make of a diaphragm on the sale of a diaphragm. The invoice is invariably written a diaphragm and there would be nothing on the invoice to distinguish whether it would be an Anchor diaphragm, a Midland diaphragm, a Wagner Electric Brake diaphragm or one of a half a dozen other manufacturers of diaphragms throughout the United States."

Mr. Bjork: Skipping to page 26 or rather going to page 27. Referring to correspondence signed by Miss Cohen:

"Q. Do you dictate these letters that she signs? A. Yes, I generally dictate them over the telephone.

"Q. What is done with incoming correspondence relating to brake chamber diaphragms, does that come to you? (216) A. It comes to my desk.

"Q. Where? A. In Long Island City.

"Q. Generally you dictate your answers by telephone and Miss Cohen signs your name? A. My letters by telephone, answers or whatever they are, any correspondence."

Mr. Bjork: On page 35 the question is asked of Mr. Johnson:

"Q. Did you bring with you, Mr. Johnson, the general ledger of Brakes, Inc.?"

Mr. Bjork: Then skipping two pages of colloquy between the attorneys for the respective parties the answer appears on page 39.

"A. Yes

"Q. Do you have any purchase orders relating to your purchases of Bendix-Westinghouse diaphragms? A. There aren't any.

"Q. You are sure there are not? A. I am quite certain."

(217) The Court: That he did not have any?

Mr. Bjork: That he did not have any.

Mr. Kleinman: That is the same testimony as your Honor will recall the testimony here. It is the same as the testimony here.

The Court: You mean about the purchase orders?

Mr. Kleinman: Yes. I don't recall the exact language used.

The Court: Purchase orders.

Mr. Bjork: Purchase orders relating to your purchases of Bendix-Westinghouse diaphragms.

Mr. Kleinman: Yes. We were talking about purchases generally.

Mr. Bjork: I mean the only purpose of offering this testimony of Mr. Johnson was to the effect that there were purchase orders and he had identified one that he had seen over there.

That is all I desire to offer from that testimony, and I will be willing now to let Mr. Kleinman see it.

Mr. Kleinman: How many hours would it require me to read all of that? Well, there seems to be about 60 pages approximately of deposition and I (218) imagine that it should all be read so that your Honor could understand whether that is within the context of the entire deposition.

Now, I am not familiar with the deposition. I have never seen it before. I was not the attorney at the time of the taking of this deposition, or at the time of this proceeding, and became the lawyer later at the time when there was some settlement of that litigation. However, as I say, I have never seen the deposition, so I can't say now. I suppose that I should read it and see whether there is any-

thing else there that might shed some light on the portions that Mr. Bjork has read into the record. I don't know what your Honor proposes to do. There are some 60 pages, and if you want me to sit down and start reading, as I have these other things to read as well.

The Court: All right.

Mr. Kleinman: Or would you perhaps suggest that we read it and meet again some other time?

The Court: Well, I would just as well save all of you from coming back here again if I could.

Mr. Bjork: I can say, your Honor, although I do not ask anybody, even Mr. Kleinman himself to buy my statement on this, but I think that I have covered (219) everything relating to books and records in there, but I think and very properly so that Mr. Kleinman should be given the opportunty to go through it.

Mr. Kleinman: I have no doubt, Mr. Bjork, if you say that is so that it is so.

The Court: Well, you can have a chance to look at it here now or subsequently, depending on what else we have to do today.

Mr. Bjork: That concludes the Government's case in chief, your Honor.

The Court: All right. I think perhaps the thing to do is to take a recess now and then you may go through these documents.

Mr. Kleinman: Before we recess, your Honor, there is one thing that troubles me somewhat. Since our last meeting, our last appearance, and perhaps I am a little over-sensitive about it, but I thought that you personally might have raised some question in connection with the proof that was offered as to whatever was delivered to my office having in

turn been delivered to the United States Attorney's office.

The Court: No, Mr. Kleinman. You mean in connection with my interrogation of Miss Hammerstein?

Mr. Kleinman: Yes, sir.

(220) That was entirely dealing with the question as to whether everything that was gathered was delivered to your office, at the time she gathered it, and very frankly that was the only purpose of my questions, and I don't think that there was really anything which could be construed as embarrassing to you in connection with that, Mr. Kleinman. Frankly, I don't see how you can help me on that unless you can serve to develop anything further on the matter.

Mr. Kleinman: No. I recall that during her testimony there was mention made of a tall young man. I was able to locate that tall young man, and Miss Hammerstein testified about it when she came to my office. I had a feeling that there may have been some indication that she talked to me on that occasion, and that that was the occasion that she was referring to.

The Court: You are the tall young man then?

Mr. Kleinman. No, I am not the tall young man. The tall young man is back here.

The Court: Well, Mr. Kleinman, I will take it either way. I don't think it matters very much. It might have some value as to what transpired, I mean (221) as to what your record shows, but there was no other indication that was meant by the questions which I asked of her.

Mr. Kleinman. I think I understand your Honor's point.

The Court: All right.

Mr. Kleinman. In that case then if your Honor intends to take a recess while we look over these documents.

The Court: Yes, I think we will do that and you may let me know when you are ready.

Mr. Kleinman. Yes, sir.

(222) Mr. Kleinman: With respect to the deposition from which Mr. Bjork read what he said were the material portions to the issue now before the Court, I am ready to agree that Mr. Bjork has read what he considered to be the material portions and we have nothing that we desire to read from that deposition.

The Court: All right, have you had a chance to look at the grand jury minutes?

Mr. Kleinman: Yes, we have looked at them.

The Court: Okay, I had better look at those.

Mr. Kleinman: Yes.

The Clerk: This is the last one that went in today (handing to the Court)

These are the previous ones.

The Court: I guess I saw those. All right. I will receive it.

Mr. Bjork: That concludes the Government's case, your Honor.

The Court: All right.

Mr. Kleinman: We have nothing further to add, your Honor.

The legal position that we have taken I believe is sufficiently outlined or indicated in the memoranda briefs that we have submitted to your Honor (223) during the course of these hearings. I think now that your Honor has the entire picture as to what Mr. Johnson testified to before the grand jury that becomes a matter for your Honor's disposition. I don't

see that we could offer any proof at this time because it is my position that the burden is upon the Government to prove that there has been a wilful disobedience of the subpoena duces tecum.

The Court: The Government rests.

Do I understand that the defendant rests, too?

Mr. Kleinman: The defendant rests.

The Court: It seems to me that there are two issues, one the issue of the question of law which you raise as to the status of the records of a dissolved corporation. In that regard I will accept the Government's theory that these are records held by the former officers of the corporation as trustees for the stockholders and whatever creditors of the corporation and the estate and anybody else who has an interest in the dissolved corporation. They are in no sense personal records, and therefore the subpoena to the corporate officer was one properly issued.

Now the next is as to the subpoena—and (224) do I understand—could I see the subpoena that was served?

Mr. Bjork: There are two subpoenas, sir, and I think that both of them need be considered in the Government's picture of the efforts at compliance such as they were.

You recall that the first subpoena called for Government records or called for records of Brakes, Inc. dealing with one contract.

The second subpoena served this year—on May 3rd I believe it was—called for additional records with respect to all the contracts and specified a number of other contracts than that 9981. And the Government submits, your Honor, that in view of the fact that after direction by the grand jury foreman to Mrs. Hammerstein additional books and records were

submitted; that had the witness Johnson made the same direction, made the same effort to obtain those books and records they would have been produced at a time at least a year earlier.

This completely eliminates for the present purposes any questions about unavailability of those documents. In fact they were produced, they were in existence. The proof of the pudding, if I may (225) be colloquial, is right there. We got them only after the grand jury having spend a considerable time direct somebody else who could easily have been directed by the president of this dissolved corporation to find those same books and records.

At the present time none of the essential books and records dealing with the Government contracts—that is, the contracts themselves, the production records, the records of shipments, if that would be more articulate, which Mr. Jaegeler testified existed at least in April of 1954, if not in October, that those still have not been produced, and as the record stands now there has been absolutely no explanation whatsoever for their non-production, and under the Nilva decision which approves the Lopiparo decision out in the Sixth Circuit we submit that United States v. Patterson, which is relied on by the witness, is no longer the rule of the Supreme Court of the United States, and for that reason there has been no showing of a bona fide effort to comply with the subpoena, and under the power vested in this Court by Rule 17 of the Federal Rules of Criminal Procedure he is in contempt.

Mr. Kleinman: Well, your Honor, there (226) has been no proof here that I can recall as to what was produced after the direction of this present grand jury to both Mr. Johnson and Miss Hammerstein.

In any event, there has been proof that some papers or documents were produced as a result of that.

Your Honor will recall the lady's testimony that she never required any orders, that she looked for all of these books and documents originally when the first subpoena was served in November of 1955, and that she looked again when she was directed to do so or requested to do so a week or ten days ago upon her appearance before this present grand jury.

If your Honor will look at the original subpoena and your Honor will recall the testimony of the lady, some of these records that were called for in the subpoena never existed. They simply didn't keep any of them.

In any event, the issue I think is a narrower one than that. Mr. Johnson in his testimony before the grand jury has stated both before and after the production of the second document or documents and books that all that he had and all that he could find have been produced and brought before this Court or this grand jury, both in November of 1955 and again (227) at the present time. Your Honor will notice that the subpoenas called for different items, the 1955 subpoena and the present May 1957 subpoena.

Mr. Johnson is being charged here with contempt in that the United States Attorney is dissatisfied with his answers. He said that his answers are evasive. Mr. Johnson has said that that is all that he knows about, he never had any of them in his possession directly or personally, that he has produced all that he could or caused the production of all that could be found. If the United States Attorney feels that Mr. Johnson did not tell the truth before the

grand jury, then of course he has his remedy, which is not contempt.

If there is no proof any more than what your Honor has now that Mr. Johnson has deliberately disobeyed the subpoena duces tecum then there could be no contempt of this Court. I don't see how the burden has been met, your Honor. This is not a case of the declination to produce books and records. This is not a case where there has been any proof offered to show that any particular records existed since the time of the service of the subpoena duces (228) tecum.

Let's assume for a moment, your Honor, for the sake of argument that some time before November of 1955, which is the date of the service of the first subpoena, these books and records were deliberately destroyed. There could be no contempt for the failure to produce even if they had been deliberately destroyed.

I am not saying that that is the issue before your Honor at the present time. I am not relying upon the fact that during the course of his testimony there has been some statements made about a fire or about the examination and inspection of a lot of documents by the representatives of Bendix-Westinghouse. All I am saying, sir, is that even if there had been proof in this case that these books and records existed some time at the dissolution of this corporation, which was April of 1955, and that these books and records did not exist according to the testimony here after that date, the mere service of a subpoena duces tecum does not make Mr. Johnson to have been the president, formerly to have been the president of that corporation responsible for his inability to comply with (229) the subpoena duces tecum. That's what this amounts to.

Now Mr. Johnson has offered his explanations according to the testimony which your Honor has seen before the grand jury.

Now true, the United States Attorney may be dissatisfied with his explanations.

The Court: Just a second. Could I have the grand jury minutes?

(Handed.)

The Court: Mr. Kleinman, where in here does he give us an explanation?

Mr. Kleinman: When he is asked by the United States Attorney at some portion of his examination did he know whether certain records were kept. He said possibly they were. Did he know where they were kept? He said probably in the office.

These things run right throughout the entire examination of this case.

He cannot account for his inability to produce because he never physically and personally had these records, books and documents. As I said before this is not the case of a man coming into court and saying, "I threw them away;" or "I destroyed (230) them"

But, arguendo, your Honor, even if he had done that it would not be a disobedience of the subpoena.

The Court: If he had done that before the subpoena was served I certainly arguendo would agree with you.

Mr. Kleinman: Yes.

The Court: But there is no basis for me to conclude that.

Mr. Kleinman: But can't your Honor draw an inference from Mrs. Hammerstein's testimony as well as Mr. Johnson's testimony that at the time of the service of subpoena in November of 1955 a search

was made to comply with the subpoena, as Mrs. Hammerstein stated everything that she colud find at that time relative to this subpoena she bundled up and caused to be sent to counsel's office. Subsequently these bundles were sent to the United States Attorney's office. That is the state of the proof in this case.

This is at the time of the service of the subpoena duces tecum. Nothing has been shown about anything as to the existence even of these books and (231) records immediately or within a short time prior to the service of the subpoena duces tecum to show that there has been any wilful dissipation of proposed evidence or contamination, destruction, or anything of that nature.

I submit, your Honor, that we simply cannot produce what we haven't got.

Should, however, the United States Attorney feel that Mr. Johnson has lied before the grand jury in stating either that he doesn't have them or he doesn't know, that he doesn't know the whereabouts of them, or didn't know exactly where they were when they were being used during the life of the corporation because of the manifold duties that he had, and as your Honor has seen from the testimony here that five or four of these corporations have their principal offices in the same place and they were being run by the same people.

If this be the case, and, as I say, if the District Attorney is dissatisfied, if he wants to proceed on the theory of perjury before the grand jury, then we will have an opportunity of meeting the issue squarely. But simply because he is dissatisfied and he offers no further proof than to (232) say that there must have been in existence at some time these

documents I submit he has failed to meet the burden which is his.

Mr. Bjork: Your Honor, I don't want to bore you by repetition, but there are a few things that I would like to answer which Mr. Kleinman has raised.

Initially as to the proof of the existence of certain of these documents Mr. Scuderi testified and identified what documents were produced subsequent to the direction of the foreman of the grand jury.

I think it is completely uncontrovertible that these books and records were in existence at the time the subpoena was served by virtue of the fact that they were subsequently produced.

Now we say that not all of the books and records were produced. We still say that that is the case. However, as to the existence of certain of those documents we have them before us now. We do in fact know that they exist.

Now with respect to Mr. Johnson's grand jury testimony, as your Honor has pointed out more than once during the course of the proceedings here, this is not a question of the Fifth Amendment. We (233) are not dealing with the rights against self-incrimination. This quite simply is a contempt proceeding based upon the fact that books were not produced. However, a reading of the grand jury testimony, which is now before you, I think gives substantiation for our position that Mr. Johnson has not attempted in good faith to comply with that subpoena.

The questions which were asked and the answers which were given, they are relevant only in so far as they show this good faith effort on his part. This is not a question of perjury. It is quite simply, did he produce the books? Was it within his power to do so? And if he has not produced the books has

he either given some reasonable and convincing explanation of there whereabouts or of his inability to produce them if they were not in fact available to him?

It seems to me that this contempt proceeding now before the Court falls completely within the Nilva and Lopiparo decisions where the Supreme Court holds that he has to present an adequate excuse for the non-compliance. He can't be forced to take the stand, he can't be forced to give an explanation (234) of what has happened to these books, but absent some showing of a good faith effort on his part to produce them he is subject to contempt.

As the record now stands there is absolutely no evidence whatsoever of the efforts that he made other than he said, "I turned them over to my attorney," and then when pushed further with respect to those questions the Fifth Amendment was claimed.

Now with respect to Mrs. Hammerstein—

The Court: Where is the testimony about turning them over to his attorney?

Mr. Bjork: I believe that that was in the—

The Court: That is May 7, right?

Mr. Bjork: —May 7, I believe, sir.

I think there is also testimony to that effect on the May 14th. But I may be in error on that.

The Court: He doesn't say that he turned them over, does he? He says to the best of his recollection they were turned over.

Mr. Bjork: They were turned over, precisely.

Mr. Kleinman: That's not correct. You have had testimony on that here, your Honor from Mrs. Hammerstein.

(235) The Court: Nobody has told me who turned them over to you.

Mr. Kleinman: That is also true.

Mr. Hammerstein recalls that they were delivered to my office and she doesn't recall who delivered them.

The Court: She recalls that they were prepared for delivery to your office and that then she saw books in your office.

Mr. Kleinman: That's right.

Mr. Bjork: She testified that Mr. Johnson did nothing more than ask were there any records. And she perhaps properly resented my question in saying, did Mr. Johnson direct her to look for the books and records. I think that that was the witness' duty under the circumstance to make such a direction. But even more convincing of his failure to do anything, when I asked her whether or not he asked her to do anything she couldn't answer it specifically, but in fact, having been asked or whatever it was by Johnson to deal with this subpoena, she did nothing.

Now it is not just a question of semantics; it is a question of good faith. Did he in fact (236) make an effort to produce those documents? Those documents were in existence, he has failed to show that they were not accesible to him or to give an explanation of why they are not available.

Now Mr. Kleinman raises the question of destruction of these books and records. Under the Goldstein case and Journey and McCracken case, and an old Supreme Court case, a man is subject to contempt if he is responsible himself for the unavailability of those documents. So even assuming arguendo that Mr. Kleinman's position is correct, that these book and Government contracts were in fact destroyed, if Mr. Johnson was responsible for it, apart from the ramifications of that act as con-

sciousness of guilt or something of that sort, he could be held in contempt.

Mr. Kleinman: I didn't say they were destroyed.

The Court: I don't think we have to get into that issue. I just said arguendo I would have agreed with Mr. Kleinman if they did.

Mr. Kleinman: May I point out to your Honor that Mr. Bjork has not quite stated what the state of the record is. Mr. Johnson testified before the (237) grand jury—I think it appears in one of these days that your Honor has—that after receiving the instruction of the grand jury or the United States Attorney to look again or look for some more records that he came down to his place at six o'clock in the morning to look for them. He has made every effort to comply with this, and whether he complied personally or asked somebody to do it for him under his direction or supervision or participated in part of it, I think is sufficient to show his good faith. But surely it doesn't show a contemptuous disregard for the order of this Court.

I am a little bit, I might say, non-plussed about these proceedings because a couple of weeks ago Mr. Johnson was arrested on a warrant in the Commissioner's office charged with the basic crime that the grand jury is now concerned in in investigating, and then we go off on one of these diversionary tactics to find out whether or not he is in fact guilty by perhaps his lack of explanations and then to come to this Court to punish him in advance of the issue that will be drawn eventually by, I assume, what will be an indictment forthcoming to find out whether the man is guilty or innocent of (238) the basic charge.

Your Honor, I gave the analogy before of the president of the United States Steel Corporation. I

can see that I could have given a much better analogy than that. But where a man is in charge of some sixty people and at least four or so office help and he is asked to produce a book or a paper, which he perhaps never knew was in existence except in perhaps general terms, or, as he said before the grand jury, there should have been such a book or he thought there was such a book where he himself had nothing to do with the keeping of these books or the making of entries in these books, or the holding of them, and especially where we have this rather mixed up affair of some other people examining them, of the books and records being taken out, of the transfer of the books and records from one place to another, and possibly—I say possibly; we are not standing upon that—and possibly the destruction of some of them by a fire or fires which occurred.

On top of all this to charge the man now with disobedience because these papers are not forthcoming—papers which I might say would perhaps be (239) copies, the originals of which have been in the possession of the Ordnance Department of the Army and undoubtedly the United States Government has them, so we are not attempting to obstruct the investigation of the grand jury by the failure to produce any papers.

Now I am not at this time arguing the question of the Fifth Amendment, but your Honor will notice that the grand jury testimony offered here as exhibits in this hearing show that there came a time when all these questions were being put to Mr. Johnson, that he did claim his privilege under the Fifth Amendment. It has nothing to do with the issue now here. But some of the questions were not

perhaps answered with the nicety that a lawyer will answer in the fealization of what one's right are as an individual and as an officer of the defunct corporation.

The Court: I would like to make it clear that whatever I see in his testimony, I was looking for it simply in hope of finding an explanation, which I am not sure he is entitled to claim on the basis of hearsay, but yet if I could have found it it would have cleared up some questions in my mind.

(240) Mr. Kleinman: Yes.

The Court: But I wasn't looking for it in the sense of any improper claim of the Fifth Amendment, because I think that we worked fairly cooperatively—I think extremely cooperatively between defense and the prosecution in trying to work out the proper line of inquiry.

Mr. Kleinman: Yes, I think we tried to eliminate that.

Your Honor, may I also say this and I shall be through now:

We did not put Mrs. Hammerstein on the stand. She has testified before the grand jury and your Honor heard her testimony here. I think in connection with Mr. Johnson's testimony before the grand jury you must consider this lady's testimony as well. She was in charge of his office. She knew obviously much more about records, books and documents and the keeping of them than Mr. Johnson ever did. So that you can't just isolate the testimony that he gave from the testimony that she gave, because if between the both you find that some explanation was offered I think that you should give the benefit of the explanation to Mr. Johnson.

(241) The Court: I certainly agree with you on that.

Anything else?

Mr. Bjork. Nothing further on behalf of the Government.

Mr. Kleinman: Nothing further.

The Court: I am going to find the defendant in contempt. It's my belief that the records exist. I have no doubt in that regard on the basis of the record before me.

The subpoena served in 1955 called for the production of sales and purchase invoices. My recollection of the testimony of Scuderi, they were not produced. They call for the production of inventry records. As to those I will take the testimony of Mrs. Hammerstein that none ever existed.

As to production records I will also take my recollection of her testimony to that same effect, that none existed.

Cash disbursements journal and cash receipts journal were produced only to, as I recall it, up to December 1953.

I may have my dates wrong on that.

Mr. Bjork: I think it was December 1954, (242) sir.

The Court: I think he testified as to two groups of records.

Mr. Bjork: That's right, sir.

The Court: I think there were some that were produced up to 1954.

But the general ledger and general journals were produced again up to December 1954.

Mr. Bjork. That is right.

The Court: The accounts receivable ledger cards were not expressly called for by the 1955 subpoena; but they were produced apparently under the seventh requirement of "All receipts, memoranda, and

correspondence relating to the above contract." But they were produced only up until January, 1954.

The sales journal and purchase journals, were only produced, as my notes show, the production of the sales journal up to December 1953, and the second journal up to September, 1954.

Now my finding is that the—incidentally I will cover the—well, I will cover this first subpoena first.

Well, at the time this subpoena was served these records existed and I base that finding largely (243) upon the testimony of Mrs. Hammerstein who impressed me as a very intelligent witness, one who was obviously loyal to Mr. Johnson, and certainly not one who would exaggerate or in any way color a fact against him, and to the best of her ability would have found an explanation for him that would help. I do not mean to suggest in any way that she was dishonest. I am talking about subconscious effects of loyalty to an employer, which, it seemed to me, from her conduct on the stand she manifested.

Now she described a system, which seemed a very thorough and careful system, completely inconsistent with the disappearance of substantial batches of records with respect to these Government transactions. Under the system she described—let me concentrate first upon the subsidiary ledger cards. They were not placed in anything except the steel drawers—at least she called them Burroughs file drawers—for these accounts, and when they were active they were kept in the steel file drawer. And even when they became inactive they were not put in trans-files or stored carelessly. They were simply put in alphabetical arrangement in the inactive files of the company, they continued to be kept in steel files in an orderly fashion.

(244) The claim or suggestion that these records were missing is inconsistent with her testimony as to this system. And I just can't believe that they were missing when she looked for them, or the impression on her would have been such that she could not have failed to recall it when she testified here a few days ago.

Her testimony then was that she thought records were missing but that it was so hazy that she just couldn't recall them.

I believe that the system as she described it and her own lack of recollection, or sharp recollection of the absence of these records is inconsistent, with any possibilities that they were missing when she searched for them. In the absence of a sharp recollection to the contrary from the nature of the system, I am convinced beyond a reasonable doubt that these records existed in 1955 when she gathered them together in response to this subpoena.

As to the invoices there might be a chance of some being missing, although the 1954 invoices were then barely a year old. They weren't ancient records in any sense. They after the end of the year 1954 conceivably were put in trans-files, and conceivably were stored upstairs, and that would explain her putting on coveralls and getting dirty as she searched for them. But that all of the (245) invoices or all of the Government contracts were missing again is inconsistent with the system as she described it; and in the absence of some explanation leaves no doubt in my mind that they existed when this subpoena was served.

Similarly she described the system for posting to sales journals, and I have no doubt that those journals existed. The only question I have as I look at the

documents now is whether all of the sales journals were produced as called for by the subpoenas.

Now my notes show that they were produced up through September, 1954.

Now, am I accurate on that or not?

Mr. Bjork: May I have just a second, your Honor?

The first group were produced through December of 1953.

The Court: That's correct. I am thinking of the second group.

Mr. Bjork: And during the second production from January 1954 to September of 1954.

The Court: Now that second production was produced here recently?

(246) Mr. Bjork: That was produced after the direction of the foreman and I believe it was last week, sir.

The Court: Well, the fact that they were produced, of course, is the most perfect proof that they existed when the subpoena was served.

Mr. Kleinman: Your Honor of course recalls that the first subpoena calls only for the production of books with reference to a contract in 1952—one contract.

The Court: That is correct. I should have so noted in the record.

And my statements as to the fact that all of the records were missing is not properly applicable to the first subpoena. But the fact that all of the invoices even as to a single contract were missing is inconsistent with the testimony which was given in the absence of some explanation for it. The only explanation which I have been able to gather from the record was the move from 35th Street.

But right now focusing on the first subpoena, assuming that the move from 35th Street to Queens might have caused the misplacing of some of the invoices, when not only the invoices are not produced, but as well the subsidiary ledger cards, and at that (247) time the sales journal are not produced, that is inconsistent with the stray misplacing of a single document.

Coming now to the second subpoena which was served on May 2nd, 1957 and which was embraced in my order to the defendant to comply with these documents, that covers all of the Government contracts, and I think it differs from the former only in so far as it requires expressly the account receivable and account payable ledger cards.

Mr. Bjork: Sir, there is one other difference in that the second subpoena called specifically for the certificates of compliance and analysis.

The Court: Oh, the certificates of compliance, yes.

What I have said as to the first subpoena I think becomes even—or at least to me even more strongly justified with respect to the second, which relates to a large number of contracts as to which, as I understand it, no invoices were produced and no subsidiary ledger cards were produced for dates after January, 1954.

Now with respect to the contracts I will make a similar finding as to their continued (248) existence based on the testimony of Mr. Jaegeler that he kept the files of these contracts, that they were in existence in steel files in the office of Mr. Johnson at the time Mr Jaegeler left that part of his work and was assigned to work in Brooklyn.

Colloquy

Again, if we were dealing with the contracts alone and it was just a question of the disappearance of a single contract I don't think I would come to this conclusion frankly. But when the failure to produce the contracts is consistent with a pattern including the failure to produce all these other records I am convinced beyond a reasonable doubt that those contracts were in existence when the subpoenas were served.

Now once these records are shown to have been in existence at the time the first subpoenas were served, and once I am convinced of the system which calls for their continued existence for a period of six years, in the absence of some unusual act which would cause their destruction or disappearance, then unless there is some proof or some testimony as to that act, I will presume that those records continued to exist; and there has been no proof (249) before me as to any incident which would cause their destruction. There was reference to two fires both of which occured before the 35th Street records, which include all of the regular books of account and invoices, were removed to Queens.

The contracts were in the Queens office at the time both of these fires occurred, but we know that they continued to exist from Mr. Jaegeler's testimony after the first fire, and it is inconceivable to me that contracts as fresh as these were in 1954 would have been in dead storage on the upper floor where the second fire is said to have occurred.

(250) The fact is that if those contracts had been destroyed by fire, or if any records had been destroyed by fire, the long course of this litigation with no suggestion to that effect would be unbelievable.

Miss Hammerstein was a conscientious head bookkeeper, and if any of those records had been destroyed it is just inconceivable to me that she would not have known of it, and that in her loyalty to Mr. Johnson she would not have spoken of it. She was not the careless type or the heedless type. She obviously took her testimony very seriously and had given this matter serious thought and any omission by her of any explanation as to the disappearance of any records was not due to heedlessness but to an honest lack of the existence of such an explanation, or at least a lack of any favorable explanation, the lack of any favorable honest explanation which she could have given on behalf of Mr. Johnson.

The next question and the only remaining question is whether or not these records are still under the defendant's control. Legally they are as the president of the dissolved corporation and practically they are because they were stored in the building and facilities which he controlled, and regardless of what (251) office he holds in the present corporation, that is, of Brakes Center, Inc., he is described by Miss Hammerstein as the boss, and we all know what that means, and there is not any doubt whatever in my mind that Miss Hammerstein would have carried out any order he gave her with respect to those records, and that he could have produced any of these records at any time if he had so desired.

I, therefore, conclude that his failure to produce these records is wilful and a contempt of this court.

Do you wish to proceed with the sentence now, or do you wish me to withhold that for awhile?

Mr. Bjork: The Government is ready to have your Honor proceed with sentence, sir, particularly in view of the fact that this is a continuing Grand

Jury investigation, and the Government submits that sentence should properly be imposed at the present time.

Mr. Kleinman: Well, your Honor, I don't believe that the Grand Jury is going to be deterred in any fashion from continuing its investigation no matter what happens to Mr. Johnson, because I think your Honor can well appreciate that there comes a time when the Court depending on Mr. Johnson's own personal conduct will (252) perhaps have to take a different position.

The Court: I want to make it perfectly clear that I have no question whatever as to the position Mr. Johnson took as to any questions asked of him. I feel that my opinion contains an expression of my appreciation to the defense counsel for their efforts to cooperate with the United States Attorney in threading this delicate line where it is proper to ask an officer about corporate records and where it is improper to ask him as to his personal acts. So I have no criticism of anything that Mr. Johnson has done in that regard. I think he has cooperated completely with the Grand Jury as to his answers or at least as to his expressions of the claim of privilege under the Fifth Amendment, and he acted in good faith in that respect.

Mr. Kleinman: Your Honor, of course, I believe can always appreciate the concern I as a lawyer have in the case as to the correctness of your Honor's ruling in the matter.

The Court: Of course.

Mr. Kleinman: And I say this most deferentially to the Court.

The Court: Yes.

Mr. Kleinman: I think your Honor can (253) understand that we should like to have the oppor-

tunity of testing your Honor's ruling with respect to the rather difficult questions which were presented at this hearing, and while we are ready for sentence, your Honor, I hope that your Honor will not remand Mr. Johnson at the present time and give us an opportunity to perfect an appeal to the Circuit Court of Appeals.

Mr. Bjork: Sir, I think what Mr. Kleinman says as to the delicate nature or the difficult nature of the questions presented is quite accurate. However, under court Rule 42(a)2 I believe it is, that the question of remand is not the real question before the Court now since bail is to be granted except where the appeal is frivolous and taken solely for the purpose of delay, and we are not suggesting that would be the case here, but we do submit that in order to perfect an appeal sentence must necessarily first be imposed.

The Court: Yes.

Mr. Kleinman: Yes, I understand that, and I was perhaps a little anticipatory. I just wanted your Honor to understand how we felt about it.

The Court: Yes, and I expect you would feel that way, but the thing I really wanted to know is whether by withholding sentence it would give you a further chance, (254) or have you exhausted whatever you felt you had to do perhaps in your client's interest.

Mr. Kleinman: I never like to close the door on the possibility of having some action deferred, but I do not want to put the burden upon your Honor. However, I have stated before several times during the course of this hearing in the questions that I have asked, and I shall ask the questions again and try to find out again and cause a further investigation to be made in the hope that something may be produced in compliance with the subpoena duces

tecum, and perhaps something may come of it yet but I can't assure the Court of anything positive along that line.

The Court: I understand.

Mr. Bjork: I am sure I do not have the language at the tip of my tongue, but I believe it is customary in contempt sentences to make that conditioned on the production of the books and records and if that production is made in proper fashion then that there is a purging of the contempt.

The Court: Well, that might have the same effect. However, I will impose a sentence of 60 days with the condition that I will rescind that sentence if these books and records are produced by (255) May 27th, or if satisfactory evidence is introduced to show that that an honest effort was made to produce them, an effort which convinces me that in fact sufficient records of this defendant have been produced. In other words, the non-production of a stray invoice is not going to be crucial.

Mr. Bjork: Thank you, sir.

Mr. Kleinman: Thank you.

The Clerk: Will you draw up a certificate or order?

Mr. Bjork: Yes.

Now on the question of bail, sir.

Mr. Kleinman: How much is the bail now?

Mr. Bjork: The bail is now set on a complaint charging violation of Title 18, Section 1001, false statements to the United States Government, and the bail is in the amount of $5,000. I am not a complete expert on matters of bail bond writing, your Honor, but I do not believe that that would properly cover the instant offense.

Mr. Kleinman: That is quite true.

The Court: I will parole him in Mr. Kleinman's custody.

Mr. Kleinman: I have always produced him and produced him (256) originally, your Honor, as I was going to say.

The Court: Yes. And at that time I will consider the question of whether I will extend this pending appeal, because although if this were a substantive crime as such and unrelated to the Grand Jury investigation, or where there is not the possibility of a successful appeal, I would have no hesitation in keeping the defendant on bail. Where there is a question of cooperation with the continuing investigation of the Grand Jury, I am not sure that would be my position. In other words, I think it is just one of the problems of the Court of Appeals as well as this Court to cooperate as quickly as possible with the Grand Jury in the disposition of its business and, therefore, I may not be able to be as liberal as I ordinarily would be.

Mr. Kleinman: Then we will appear before your Honor on the 27th.

The Court: On the 27th, yes.

The Clerk: What time?

The Court: I think around noon would be sufficient as I have a long calendar.

Mr. Bjork: In view of the fact that on the 27th there are arguments on the motion to punish (257) and to dismiss the indictment, and arguments in the contempt case which will be before you at that time, your Honor—

The Court: Yes.

Mr. Bjork: And I know that there will be long arguments so in that connection if I may suggest it, your Honor, and if it is all right with Mr. Klein-

man or if he is so disposed, would he be available to make it at 2 o'clock, or would that meet with your Honor's approval?

The Court: All right.

Mr. Kleinman: I am quite sure that will be all right but just let me check.

The Court: Yes.

Mr. Kleinman: 2 o'clock will be fine, your Honor.

Mr. Bjork: I am going to be here on the 27th so I may just as well stay as far as my own calendar is concerned.

The Court: Very well. 2 o'clock on the 27th, gentlemen.

Mr. Bjork: Thank you.

Mr. Kleinman: Thank you.

(Adjourned to May 27, 1957, at 2 P.M.)

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(258) New York, May 27, 1957,
2 P. M.

(Same appearances as before.)

Mr. Kleinman: Your Honor, since we were here last, Mr. Johnson and Mrs. Hammerstein—and I must say it was mostly due to Mrs. Hammerstein's effort—looked all over the place and came up with these records which are hard to describe, but Mrs. Hammerstein is here now, and I thought if your Honor would permit a reopening for the purpose of finding out whether or not we have attempted to purge ourselves or whether we did purge ourselves, I would like to put her on the stand and have her tell your Honor what these records are and where she found them and under what circumstances.

The Court: All right.

Mr. Bjork: I have no objection, your Honor.

The Court: Very well.

Mr. Kleinman: Will you take the stand, (259) Mrs. Hammerstein.

ILSE HAMMERSTEIN, previously sworn, recalled to the stand.

The Court: I wonder whether you want to take testimony on this or whether it is better to have someone go through these records and see what you have.

Mr. Bjork: Well, that is what I assume was being done at the moment, merely the identification of the books and records which have been produced, as I understand. Maybe I am over-stepping here.

The Court: All right. I just thought the fastest way to do it would be that.

Mr. Kleinman: I think this will take just a few minutes and then your Honor will know what the situation is.

The Court: All right.

Mr. Kleinman: Then Mr. Bjork can have them look it over.

Direct Examination by Mr. Kleinman:

Q. Now, Mrs. Hammerstein, you were in court on the 21st of May, 1957, when we were last here? A. Yes, sir.

(260) The Clerk: No, she was here on Monday, the 20th.

Mr. Kleinman: Well, she was also here that day, I think.

Q. Were you in court the last day we were here? A. No, sir.

Q. All right. You were here on the 20th of May? A. Yes, sir.

Q. That is the last time that you were here? A. Yes, sir.

Q. Now on the 21st of May, 1957, did you receive some requests from Mr. Johnson and a request from me to do something with reference to the books and records and where the books and records are kept at the place where you are employed?

Mr. Bjork: If your Honor please, I object to the question. It is my understanding that the hearing as such is terminated, that all that is before the Court at this time is the physical process of listing what actually has in fact been produced pursuant to your direction last Tuesday, that the defendant had until today to purge himself of contempt by producing the books and records, and all that need be (261) done now is to have Mrs. Hammerstein testify as to those records she has with her at the present time.

Mr. Kleinman: Well, your Honor, you can always reopen the matter, and I thought it might be of some importance to our case.

The Court: Let us find out first what we have here, Mr. Kleinman—

Mr. Kleinman: Very well.

The Court: —before we go into the other matter.

Q. Will you tell us what these records are which you have before you now. Let us take this one first—

Mr. Kleinman: May we have it marked for identification so that the record shows what it is.

(Marked Respondent's Exhibit A for identification as of May 27, 1957.)

By Mr. Kleinman:

Q. I show you Respondent's Exhibit A for identification. Will you tell the Judge what this is, and the pages that you have marked with these pieces of paper, will you explain what those pages are, and give us the particularization of each page as to date, if you can. (262) A. These are filed copies—by that meaning accounts receivable invoice filed copies which are to be kept in numerical order. This is marked October 26, 1951, to November 15, 1951.

Then going through every one of these pages I found several invoices made out to the New York Ordinance District with the order number, with the Government order numbers in question.

Mr. Bjork: If your Honor please, I think that once again I must object. As to what those documents are they will of course speak for themselves.

Mr. Kleinman: I don't know what he wants, your Honor. I thought he wanted us to do this.

Mr. Bjork: I suggest all that is in order is the listing for the record of the documents which she has with her and that can be done by identifying the title page and marking them as exhibits.

Mr. Kleinman: I don't know whether there is any description of documents. I don't know what it means.

The Court: What it means is a matter of time—the documents are produced; why, where they came from, how they were obtained I think is of secondary interest to me now.

(263) Mr. Kleinman: I will have to tell your Honor there will have to be an itemization because I don't

know what will satisfy the United States Attorney as to production. The record should contain something as to what they are.

The Court: All right, go ahead.

Mr. Kleinman: With that I will proceed as quickly as I can.

The Court: Yes.

Q. Just tell us what these documents are that you found with reference to any of the contracts mentioned in the subpoena duces tecum? A. In these two books I found several copies of Government invoices regarding the contract numbers on the subpoena.

Mr. Kleinman: May I ask your Honor, do you want the exact number of them or just mark them?

The Court: No. In other words, we have a general picture of what she has. In other words, we have a numerical set of invoices and there are several relating to the contracts in question.

Mr. Kleinman: Yes, all right, and for the convenience of the United States Attorney we have some pieces of paper marking those which we believe are (264) the relevant ones.

May I have this marked for identification?

(Marked Respondent's Exhibit B for identification.)

Q. I show you Respondent's Exhibit B for identification. Will you briefly describe and say what these are? A. This is the same as the other one—Exhibit A I believe—except the dates are from September 19, 1953, to October 14, 1953, and there are several Government invoices in that file.

Mr. Kleinman: There are six papers together.

May we have them marked as one exhibit for identification.

(Marked Respondent's Exhibit C for identification.)

Q. I show you Respondent's Exhibit C for identification and ask you to tell us what these are? A. These are accounts receivable ledger cards.

Q. And do those ledger cards or some of the entries on those ledger cards pertain to the contracts called for in the subpoena duces tecum? A. I tied in three of the invoices one one of the cards as relating to Government billings on the (265) contracts.

Mr. Kleinman: All right.

Will that be sufficient, do you think, your Honor?

The Court: Yes.

Are these ledger cards by particular account?

The Witness: These are all U. S. Government cards but I don't think they all pertain to these contracts.

The Court: I see. In other words, this is a single ledger account for the United States Government, is that right?

The Witness: Yes, but I believe there were several accounts for the Government, one for the Post Office and such, but I did find one page that definitely ties in with some of these invoices.

The Court: All right.

Mr. Kleinman: Could I without numbering the sheets just—

The Court: A batch of—

Mr. Kleinman: A batch of sheets, yes.

(Respondent's Exhibit D marked for identification.)

Q. I show you Respondent's Exhibit D for (266) identification and will you tell us what these are? A. This is a general ledger from December 1, 1949, to November 30, 1950.

Q. And do any of the pages we have here marked in that one exhibit refer to any Government contracts as called for in the subpoena duces tecum? Can you say? A. I couldn't tie it in.

Q. Well, you mean that one would have to examine all these general ledger sheets in order to determine whether they apply? A. They are a total of all—this is a total of all business. It would not show particular transactions separately.

Q. In other words, it may apply or it may not; is that it? A. Yes, sir.

(Respondent's Exhibit E marked for identification.)

Q. I show you this book, Respondent's Exhibit E for identification and will you tell us what this is very briefly, please? A. This is a cash disbursements book starting on January 1, 1954, and ending November 30, 1954.

(267) Q. And are these pages which you have clamped together with a paper clip those which refer to some of the Government contracts in issue here? A. No reference. They just happen to be in here.

Q. I see. Have you looked through this book? A. I glanced through it but that would not show me whether they had any relations with the Government contracts.

Q. Do you think that it may have some relation with the Government contracts? A. I have no way of knowing.

The Court: This would have all your disbursements for that period, wouldn't it?

The Witness: That's it.

The Court: The Government contracts and any others.

Mr. Kleinman: This may have some materiality, your Honor.

The Court: I think it is one of the documents called for.

Mr. Kleinman: Yes.

Now as I understand your Honor's ruling you don't desire any testimony as to how they were found or where they were found.

(268) The Court: No, no. All I was anxious to see is to get records produced that we could.

Mr. Kleinman: Will your Honor excuse me?

The Court: In other words, I don't want to embarrass anyone as to where, how or why.

Mr. Kleinman: Your Honor, I think perhaps I might invite your Honor's attention to what was said by your Honor on May 21, 1957, at page 254 et seq.

Your Honor stated after imposing sentence:

"However, I will impose a sentence of 60 days with the condition that I will rescind that sentence if these books and records are produced by May 27th, or if satisfactory evidence is introduced to show that an honest effort was made to produce them, an effort which convinces me that in fact sufficient records of this defendant have been produced. In other words, the non-production of a stray invoice is not going to be crucial."

I was attempting to offer testimony that I suggested before for that reason.

The Court: I tried to clarify that by that last statement. In other words, what I am interested in is substantially all of the records called for, not another unsuccessful attempt to produce (269) them.

Mr. Kleinman: Will your Honor permit simply the explanation that after a thorough search of some three or four days these are all the records that could be found.

The Court: I will take your statement to that effect.

Mr. Bjork: Of course the only thing that I want to make clear is that the hearing in chief was concluded and in view of the indications by Mr. Kleinman that appeal is contemplated I want to be certain that as far as the record before the Court of Appeals is concerned that it is the same record upon which your Honor ruled.

Now these additional documents I understand from what I gathered from your rulings before that if the documents themselves were produced which were called for then there would be a purge. As to whether or not the documents produced have been sufficient is of course a matter for your Honor to determine.

Mr. Kleinman: Yes, of course, but that would be a determination that your Honor will have to make as to the honest intention or the good faith and the method of searching for them, whether it was in compliance with your Honor's ruling.

(270) The Court: Well, I would like to make it perfectly clear that the good faith and compliance that I was talking about there was a compliance with the subpoena. In other words, "substantial compliance" would have been a better expression, perhaps—I think I could use that expression "substantial compliance."

Mr. Kleinman: Perhaps your Honor did.

The Court: That is what I thought—the failure to produce the bulk of the books—if a stray record had been lost, I could understand, but I could not understand the other thing without an explanation.

Now my suggestion is that we adjourn this proceeding to give Mr. Bjork a chance to look through these records, or to have his accountant look through them to see what part of the gap can be filled. It is not too clear to me.

Mr. Kleinman: No, I am lost.

The Court: What is this other package (indicating)?

Mr. Kleinman: There are some books there which were found hidden away somewheres, although I am told they do not apply to any Government contracts.

(271) The Court: I see.

Mr. Kleinman: I have them here, but since they are not in compliance with the Government subpoena they are immaterial.

Mr. Bjork: I think it is perfectly clear, without any more than a cursory examination that I have made here a few moments ago, that the Government contracts, the records of shipment, the certificates of compliance and analyses, the existence of which Mr. Jaegeler placed in April 1954 are still not produced. These are the essential books or records which the Government is seeking, which the grand jury is seeking. These do bear on the existence at the time the subpoena was served—

The Court: When you are speaking about "these", what do you refer to?

Mr. Bjork: I now refer to Defendant's Exhibits A through E for identification.

We have to view this from two points: One, at the

time that your Honor ordered the books and records produced pursuant to the subpoena duces tecum, and now here again, after the order of conviction of contempt had been made—that these show no more than the existence of certain books and records (272) which were not produced heretofore, but I can see at this time we still do not have the very basic books that we are seeking, so that an adjournment for those purposes I think would not be necessary or fruitful. I think there are isolated invoices and there is a cash disbursements journal—is that correct, an additional one?

Mr. Kleinman: Yes.

Mr. Bjork: —which is now marked Respondent's Exhibit A for identification, so that I feel we have here the very type of thing that you said would not be sufficient, the production of isolated books and records.

Mr. Kleinman: Well, I tried to comply with your Honor's suggestion, and I tried to get Mr. Johnson and Mrs. Hammerstein to comply with them, too, but I am afraid that nothing will ever satisfy Mr. Bjork. This is all that we have, sir.

The Court: All right.

You are sure that the other record, Mr. Kleinman, won't bear on this at all?

Mr. Kleinman: I will let him look at it if he wants to.

The Court: We are looking for any (273) straw that we can find.

Mr. Kleinman: That is what I tried to do.

Mr. Bjork: I am willing to take—

The Court: What books are these?

The Witness: These are cash receipts and sales journals—but I wouldn't know—and they are prior to that, they are older.

The Court: They are all before the period that we are interested in?

The Witness: I don't know—they are 1949.

The Court: Mr. Bjork, are you interested in anything that far back?

Mr. Bjork: 1950 is the beginning, but I do not feel it is up to me to see what it does contain.

Mr. Kleinman: I am trying to produce all that we can from Brakes, Incorporated—that is our purpose.

The Court: I think, Mr. Kleinman, I will let the sentence stand. I do not regard this as a sufficient production of them. I do appreciate the effort you have made to do it, and I can see that you looked at other sources in an attempt to produce secondary copies of what the Government (274) asked for, or at least secondary sources for the material that the Government thought you could put your hands on.

Let the sentence stand.

Now we come to the question what to do pending an appeal.

I feel somewhat differently about this, as I indicated the last time, because my function is to help the grand jury out. The inquiry is still going on. I don't know how long this grand jury will be in session.

Mr. Bjork: This grand jury is scheduled to be dismissed on June 3, sir. I cannot state at this time whether or not it will be held over.

Mr. Kleinman: Your Honor I think what might be of some importance to your Honor is determining what to do from this point on is that so much of what has been asked for in a subpoena duces tecum, as I stated somewheres during the argument of this hearing, is in the possession of the Govern-

ment because the original documents were in the possession of the Government to begin with—and I am sure that the Government's case is not being obstructed by the failure to produce, even assuming that these (275) things are in existence at the present time—and I am sure also that the Government later on, if it finds anything in existence, could always have these other matters brought in before a grand jury for the purpose of a superseding indictment, if that should be necessary at some later date.

The point I am trying to make is that I am fairly convinced in my own mind that our failure to produce these books and records called for in the subpoena is not obstructing the grand jury's investigation.

The Court: Well, how great the obstruction is I don't know, but I would be surprised if it weren't at least obstructing as to some defendants or as to some possible defendants.

Mr. Bjork: Sir, I do not mean to interrupt, but I think it is perfectly apparent from the amount of time that has been devoted, not only on the part of the Court but the grand jury and the United States Attorney's office, that there has been an interference with a lawful investigation. The degree to which that interference exists probably will not appear until sometime later in the proceedings, but nevertheless the obstruction does exist, and on the question (276) of remand or bail because of this obstruction, the Government respectfully requests that the defendant be remanded at this time, that the Rules of Criminal Procedure, No. 42—no—about bail pending appeal—provides that the bail shall be granted except where the appeal is frivolous or taken solely for the purpose of delay—it is Rule 46.

The Government does not state that it believes this appeal would be frivolous. However, under the determinations of this Court, and the Supreme Court, there are still other considerations to be taken into account—still other considerations to be viewed at the time of setting bail.

Judge Levet, in United States v. Brown, in a very similar situation just a few weeks ago, where the question was under 42(a) and not under 42(b), on a refusal to answer questions, refused to grant bail pending appeal.

The defendant there, the appellant, moved in the Court of Appeals, and some two weeks later bail was set in the amount of $5000.

New we suggest that the Brown case, while relevant, is not determinative here. You have a question of the grand jury about to be discharged. (277) You have an actual obstruction of the function of that grand jury, and that the ordinary bail rules, as set forth in Rule 46 are not completely applicable.

The fact that grand jury might be held over for a further period of time is really quite irrelevant. The fact is that at the present time they are being obstructed, and the remand of defendant might have a further effect.

Mr. Kleinman: Your Honor, the original subpoena was served in November 1955. Nothing was was done or said about it until May 2nd or 3rd or 4th of this year.

This grand jury is no different from all other grand juries, and it seems to me that the United States Attorney on many innumerable occasions has held over grand juries because cases have been left undetermined at the end of a term.

I daresay, your Honor, that the defendants who

will be indicted, if there is an indictment forthcoming, are all apprehended already because there is that Commissioner's Complaint and Warrant in which some three, I think, defendants have been apprehended, including Mr. Johnson. So that these people are present, the arrest has already been (278) made and the grand jury will continue.

The Court: What about Mr. Kleinman's point, Mr. Bjork?. This is not a matter of minutes or moments.

Mr. Bjork: No, sir. As a matter of fact, your Honor, Mr. Hallinan, who has now left the office, was proceeding in this regard; when he was unable to get the books and records he had to adjourn a case—a case with which your Honor is familiar, the Miller situation—and I did not receive it from him until that time.

Now the item here is whether or not those books and records should have been produced at one of three times: One, the first subpoena; two, the second subpoena, and, three, on the order of the Court.

Now the fact that this grand jury may be held over in the present posture of things—and it is quite possible that I myself will be held over for a sufficient period of time so that I can get these books and records.

The Court: How long would it take you—I was thinking if we can sort of meet this situation halfway—this is a very short record.

(279) Mr. Kleinman: Yes.

The Court: Actually this is largely a question of fact, the adequacy of the evidence rather than any new question of law which has ever been considered before.

I should think that this could be ready for the

Court of Appeals this term if they want to hear it.

Mr. Kleinman: May we have Mr. Greenberg answer it, because he is now my associate counsel.

The Court: Yes.

Mr. Greenberg: As your Honor knows, I do a great deal of appellate work. I have already inquired of Mr. Fusaro, the Clerk of the Court of Appeals, with respect to various matters in this case, and one of my questions was "Could an appeal in this matter be heard in the June Term?"

And I have been assured that it cannot.

The Court: Well, that would be true of the ordinary one, but if the Government asks for a preference I am not sure whether you would get the same result.

Mr. Greenberg: I would have no objection to have this preference heard in the second week of (280) the June Term but I am advised by the Clerk that their dockets are full and they have tried to put on criminal cases mainly where the defendants are in jail.

Mr. Bjork: I have four cases at the present time for the second week in June, and I know from both the experience that we had on No. 4—the difficulty to get it on the calendar—that it may be exceedingly difficult, although I am ready to say to your Honor that we will certainly make that effort or attempt.

The Court: All right. I am thinking of staying the execution on condition that you have your appeal perfected and your briefs—at least the appellant's brief served—if the Government cannot keep up with the pace, that is the Government's problem—by June 5th.

That gives you ten days. Of course there is the long weekend coming up.

Mr. Greenberg: It is a question of the printer, your Honor. It is out of our control.

Mr. Bjork: I believe on proper application to the Court of Appeals the printing could be dispensed with.

The Court: The printing could take overnight.

(281) Mr. Greenberg: I hope so, but only at the very last term Judge Clark made a statement to the effect that the practice of going up on typewritten papers is to be deplored, and they are looking only to have that in forma pauperis cases.

The Court: It is a hardship on the Court; there is no reason why you can't do that.

Mr. Greenberg: I will do the best I can, your Honor.

Mr. Kleinman: Your Honor, there are some 260 or so pages, including today.

The Court: Ordinarily the record won't take long. As you know, the thing that will hold it up is the lawyers' briefs.

Mr. Greenberg: I will perfect the appeal and docket the appeal within any time that your Honor fixes. Of course we do have the long weekend.

The Court: Yes. Then you can have your briefs in by—

Mr. Greenberg: If I can have my briefs ten days after the appeal is docketed, then the case will not be reached until October in any event.

I would ask the Court if they want to (282) take it during the second week of June, I would be ready that week.

Mr. Bjork: Could we perhaps leave it to the Court of Appeals as to the time for the briefs, your

Honor, and limit your consideration now to the filing of the prosecution of the appeal?

The Court: All right.

Mr. Bjork: It may be that the Court of Appeals will take argument and take briefs later.

The Court: All right, then you can certainly have your appeal docketed by the 31st of May, couldn't you?

Mr. Greenberg: Friday?

The Court: Yes.

Mr. Greenberg: I do not believe they are open on Friday. I think they are closed on Friday.

The Court: I will tell you the reason: The motion day is the 3rd, and if we are going to have any application I would like to be in a position to make it on the 3rd.

Mr. Greenberg: You mean in the Court of Appeals?

The Court: Yes, with respect to perfection. Mr. Bjork will go up there and ask, (283) and if they say "No," they will not hear you, that is not your fault, or anybody else's fault, but if you have your appeal perfected by then, then you are really all ready to go.

Mr. Greenberg: Yes.

The Court: I do not think that would be too difficult.

Mr. Greenberg: Then the question will be what disposition would be made of bail pending appeal, because if we perfect our appeal, then would Mr. Johnson be released in bail pending the entire disposition?

The Court: I would release him on bail pending appeal on condition that you have your appeal perfected by June 3rd, before the opening—in other words, you are ready to perfect it.

Mr. Greenberg: June 3rd is a week from today.

The Court: That is right.

Mr. Bjork: I have to get an order that can be signed and I will do that as quickly as I possibly can.

Mr. Greenberg: I do not see how I can do it. I will state one of the reasons why. (284) In the case in which I am involved with Mr. Bjork, I was given until two weeks from last Friday—that would make it about June 7th—to file a brief for a man whose attorney died, so I have that one.

Now I am presently making motions in the cases of Domenico Bando and Gondolfo Miranti for leave to file in forma pauperis for the contempt convictions in their cases, so it becomes a physical impossibility.

I will do everything in my power but to limit me to June 3rd, I don't know—it will be beyond my control.

Mr. Kleinman: Can't you possibly give him another week, Judge?

The Court: That is going to make it academic so far as I am concerned.

Mr. Greenberg: If the record is docketed the following Monday, that is, the 10th of June, then the Court can hear argument during that week if it wishes and have us file our briefs at any time thereafter.

The Court: I will give you the choice of another week—the first week of June—

Mr. Bjork: I can almost say there just (285) is no time, sir. That is my impression from what Mr. Fusaro told me.

Mr. Greenberg: Yes, because Judge Medina denied me an opportunity to orally reargue the case in

which the other attorney had died. There were only two judges sitting, and the reason I was denied oral reargument was because of the posture of the argument calendar.

The Court: What is the most helpful thing I could do?

Mr. Bjork: Well, the most helpful thing would be to require that the appeal be perfected by Thursday—

The Court: By the 7th?

The Clerk: The 6th of June.

Mr. Bjork: —the 6th of June, or then if it is not so perfected, that the bail will be revoked.

The Court: All right.

Mr. Bjork: And at that time, that still would still leave Mr. Greenberg Friday, Saturday, Sunday, and on Monday, if a motion were to be made in the Court of Appeals for bail pending appeal, it could then be made.

Mr. Greenberg: As I understand the rule, (286) if your Honor fixed bail pending appeal, that would cover through and including the United States Supreme Court—if the condition were to be that we perfect our appeal, and having met your Honor's condition, then this defendant or respondent, or whatever he is is then in bail for the entire appeal process.

Mr. Bjork: Well, the bail could always be granted subject to certain conditions.

The Court: I think we are talking about different things. I do not think there is any question now about how long the bail will be good for. The bail is granted on condition that you have your appeal perfected by by June 6th. All right?

Mr. Greenberg: Yes.

Mr. Bjork: There remains, then, the question of the amount.

Mr. Kleinman: Well, as I told your Honor last time, he is under $5,000 bail now, and it would simply be enriching the surety company to require any higher rate of bail at the present time.

The Court: There is no way I can make that bail cover this, is there?

Mr. Kleinman: I don't know. Perhaps Mr. Sweeney can tell us.

(287) The Clerk: I think the simplest thing to do would be to release him on his own recognizance.

The Court: There is that other charge.

Mr. Kleinman: In my opinion, your Honor—

Mr. Greenberg: The bond could be rewritten.

Mr. Bjork: I do not believe so.

The Clerk: No, it cannot.

Mr. Bjork: I think, sir, under all the circumstances, while the Government ordinarily requests that bail be set, in view of the fact that Mr. Johnson has appeared on every occasion when he has been required to do so, both by the grand jury and the Court, that we would have no objection at this time to having him released in Mr. Kleinman's custody, if Mr. Kleinman so desires to accept it.

The Court: Yes.

Mr. Kleinman: Yes, I have known Mr. Johnson for three or four years now and I have no objection to that.

The Court: I will put him in your custody on condition that the appeal is perfected as stated.

Mr. Kleinman: Yes.

Government's Exhibit 1

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To

Brakes, Inc.
37-16 Queens Blvd.
Long Island City, Queens, N. Y.

GREETING:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 514 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 30th day of November 1955, at 10:00 o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of Title 18, Section 1001, U. S. C. and not to depart the Court without leave thereof, or of the District Attorney, and that you produce at the time and place aforesaid the following:

The following books and records relating to United States Government Contract DA-20-113-ORD-9981, awarded to Brakes, Inc. 6/30/52:

1. All sales and purchase invoices;
2. All inventory records;
3. Production records;
4. Cash disbursements journal; cash receipts journal;
5. General ledger and general journals;
6. Sales journals and purchase journals;
7. All receipts, memoranda, correspondence relating to above contract.

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

WITNESS, the HONORABLE William Bondy, Judge of the District Court of the United States for the Southern District of New York, in the City of New York, on the 18th day of November in the year of our Lord, One Thousand Nine Hundred and Fifty-five.

WILLIAM V. CONNELL
Clerk

PAUL W. WILLIAMS,
United States Attorney for the
Southern District of New York.

Note: *Report at Room* 413. In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room 413, upon each day on which you attend Court as a witness.

Assistant Clement J. Hallinan Room 415

Government's Exhibit 2

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To

Lawrence Johnson, President
Brakes, Inc.
37-16 Queens Boulevard
Long Island City, Queens, N. Y.

GREETING:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 513 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 7th day of May 1957, at 10:00 o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of Title 18, Section 1001, U. S. Code, and not to depart the Court without leave thereof, or of the District Attorney, and that you produce at the time and place aforesaid the following:

All books and records of Brakes, Inc. relating to Government contracts numbered DA-20-089-ORD-11841, DA-20-089-ORD-12442, DA-20-089-ORD-20591, DA-20-089-ORD-20596, DA-20-113-ORD-611, DA-20-113-ORD-4693, DA-20-ORD-113-5057, DA-20-113-ORD-6740, DA-20-113-ORD-7441, DA-20-113-ORD-8439, DA-20-113-ORD-9278, DA-20-113-ORD-9981, DA-20-113-ORD-12244, including but not limited to:

1. All copies of said contracts.
2. All sales and purchase invoices.
3. All inventory records.
4. Production records.

5. Cash disbursements journal; cash receipts journal.
6. General ledger and general journals.
7. All account receivable and account payable ledger cards.
8. All receipts, memoranda, certificates of compliance and analysis, and correspondence relating to the above contracts.

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

WITNESS, the HONORABLE JOHN W. CLANCY, Judge of the District Court of the United States for the Southern District of New York, in the City of New York, on the 2nd day of May in the year of our Lord, One Thousand Nine Hundred and Fifty-seven.

HERBERT A. CHARLSON
Clerk

HELEN COLP
Deputy Clerk, U. S. District Court
Southern District of New York

PAUL W. WILLIAMS
United States Attorney for the
Southern District of New York.

Note: *Report at Room* 413. In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room 413, upon each day on which you attend Court as a witness.

Assistant Robert W. Bjork Room 415

Government's Exhibit 3

May 14, 1957 Johnson

LAWRENCE JOHNSON, recalled.

By Mr. Bjork:

Q. Mr. Johnson, you are still under oath, sir. A. Yes, sir.

Q. And are you now prepared to present to the grand jury the evidence of the whereabouts of the corporate books and records to which you were directed to testify by Judge Walsh? A. All of the books and records to the best of my knowledge and belief, sir, have been turned over to my attorney.

Q. Mr. Johnson, did you at any time have any other books and records called for in Grand Jury Exhibits 11 and 12 which have not been turned over to your attorney? A. Sir, no books and records were ever under my direct supervision. I had an office and the office took care of all of the books and records.

Q. Mr. Johnson, as president of the corporation, included within your powers were the general supervision of the books and records of Brakes, Inc., is that not correct, sir? A. Not the direct supervision. They were in the hands of the office.

Q. What officer of the corporation was so empowered, if not you? A. I wouldn't know how to answer that question, sir. I don't believe there was anybody so empowered.

Q. I believe that doesn't answer the question. Have you at any time seen certificates of compliance and analysis in the files of Brakes, Inc.? A. I could have, sir. I honestly couldn't remember.

Q. Mr. Johnson, I have with me approximately 165 certificates of compliance and analysis purporting to bear the signature of one Lawrence Johnson. The years involved run up to and including 1954. Do I understand you to say

at this time you cannot recall whether or not you have ever seen these certificates of compliance and analysis? A. I respectfully answer the same as I did before. I might have. I can't remember it, sir.

Q. You can't remember it? A. No, sir.

Q. Would it refresh your recollection if I showed you the certificates of compliance to which I refer? A. It might.

Q. I show you Grand Jury Exhibit 9 consisting of a series of certificates of compliance and analysis, and ask you whether that refreshes your recollection as to whether or not you have ever seen a certificate of compliance and analysis? A. I respectfully decline to answer, sir, on the ground that my answer may tend to incriminate me.

The Foreman: I direct you to answer the question.

The Witness: I respectfully decline to answer, sir, on the same grounds.

The Foreman: On what grounds?

The Witness: That my answer may tend to incriminate me, sir.

Q. Mr. Johnson, I am going to terminate—withdraw that. I am going to interrupt the Government's examination of you with respect to these exhibits, and I am going to request that you return here at 12 o'clock tomorrow with Mr. Kleinman or any other counsel whom you desire to represent you, and at that time we will seek further relief from the United States District Court. That's all for today. A. Thank you very much. (Wit. Ex'd)

Government's Exhibit 4

May 7, 1957

Re: Brakes, Inc., et al.

Mr. Bjork

Lawrence Johnson

LAWRENCE JOHNSON, called as a witness, and having been sworn by the Foreman of the Grand Jury, testified as follows:

By Mr. Bjork:

Q. Mr. Johnson, would you state your name and address to the grand jury, please? A. Lawrence Johnson, 23 Birch Hill Road, Lake Success, Long Island.

Q. Mr. Johnson, are you here pursuant to a subpoena served upon you by a Marshal of the United States on Friday, May 3rd? A. I am, sir.

Q. Do you have that subpoena with you, sir? A. I have.

Q. May we have this marked as Grand Jury Exhibit 11. (So marked). Were you also served with a subpoena, Mr. Johnson, some time in November of 1955, calling for the production of certain books and records? A. I believe that's correct, sir.

Mr. Bjork: May we have that document now before Mr. Johnson marked as the Grand Jury's Exhibit 12? (So marked).

Q. Mr. Johnson, were you an officer of Brakes, Incorporated? A. I was.

Q. And what office did you hold? A. President.

Q. And has Brakes, Incorporated, subsequently—I withdraw that. Was Brakes, Incorporated, dissolved sometime in 1955? A. It was dissolved. I'm not quite certain of the year.

Q. Were you the sole owner of the stock of that corporation at that time? A. Yes, sir.

Q. Mr. Johnson, the subpoenas marked Grand Jury's Exhibits 11 and 12 call for the production of certain books and records of Brakes, Incorporated. Do you have any of those records with you, sir? A. No, sir.

Q. Where are those records? A. To the best of my recollection they were all turned over to my attorney.

Q. Who is your attorney? A. William Kleinman, K-l-e-i-n-m-a-n.

Q. All the books and records called for in this subpoena were in fact turned over to Mr. Kleinman? A. To the best of my recollection.

Q. Do you recall whether or not at any time you had all the books and records called for in these subpoenas? A. I couldn't remember that, sir.

Q. Did you cause an investigation to be made of the files of Brakes, Incorporated, to ascertain whether any of the documents called for were still in your possession? A. To the best of my recollection they were all turned over to the attorney, whatever we had, sir.

Q. Would you read my question to Mr. Johnson, please? (Stenographer reads: Did you cause an investigation to be made of the files of Brakes, Incorporated, to ascertain whether any of the documents called for were still in your possession?) A. Under the advice of counsel I decline to answer for fear, because the answer might tend to incriminate me, sir.

Q. Mr. Johnson, I am calling for the production of books and records of Brakes, Incorporated, a corporation of which you are the president. I am asking you whether or not you as president with that corporation have caused an investigation to be made with respect to the subpoena which was served upon you? A. I decline to answer for the same reason, sir.

Q. That is to say, the Fifth Amendment? A. Yes, sir.

Q. Mr. Foreman, would you direct the witness to answer that question?

Foreman: You are hereby directed to answer the question of the Assistant District Attorney.

Witness: I have been advised by counsel, sir, to refuse to answer for the reason before mentioned.

Foreman: For what reason?

Witness: That my answers might incriminate me.

Q. Mr. Johnson, do you believe in good faith that if you answered that question it would involve you in a criminal prosecution? A. I decline to answer on the same reasons.

Q. At any time in the past, Mr. Johnson, have you had under your supervision the books and records called for production in the subpoenas marked as Grand Jury's Exhibits 11 and 12? A. I decline to answer, sir, for the same reason.

Q. Mr. Johnson, do you recall testifying in a civil action brought by Bendix-Westinghouse against Brakes, Incorporated? A. I decline to answer, sir, for the same reason.

Mr. Bjork: Mr. Foreman, would you direct the witness to answer that question.

Foreman: In the name of the Grand Jury present you are hereby directed to answer the question asked by the Assistant United States Attorney.

Witness: Sir, I have been instructed by counsel to decline to answer for the reason that my answer might incriminate me.

Q. Did the corporation, Brakes, Incorporated, ever maintain records of inventory? A. I decline to answer, sir, for the same reasons.

Government's Exhibit 4

Mr. Bjork: Would you instruct the witness?

Witness: Again, you're instructed by the Grand Jury to answer this question, instfucted and directed to answer the question.

Witness: I have been advised by counsel to decline to answer, sir, for the same reasons.

Continued by I. F. G.

The Witness: I have been advised by counsel to decline to answer, sir, for the same reasons.

The Foreman: What reason?

The Witness: That my answer might incriminate me.

Mr. Bjork: Thank you, Mr. Foreman.

By Mr. Bjork (Cont.):

Q. Mr. Johnson, at any time was there a fire in the plant of Brakes, Inc.? A. I decline to answer, sir, for the same reasons.

Mr. Bjork: Would you direct the witness to answer that, please, sir?

The Foreman: Again I direct you, in the name of this Grand Jury, to answer the question.

The Witness: I have been advised by counsel, sir, to decline to answer, for the reason that my answer might incriminate me.

Q. Have you at any time reported a burglary in the plant of Brakes, Inc., where books and records were found to be missing? A. I decline to answer, sir, for the same reason.

Mr. Bjork: Would you instruct the witness, Mr. Foreman?

Government's Exhibit 4

Mr. Foreman: Again, for the fifth time, the Grand Jury instructs you to answer the question.

The Witness: I have been instructed by counsel, sir, to decline to answer.

Q. Mr. Johnson, do you in good faith believe that the truthful answer to that question would involve you in a criminal prosecution? A. I decline to answer, for the same reason.

Mr. Bjork: Mr. Foreman.

The Foreman: Again you are instructed by the Grand Jury to answer the question.

The Witness: I have been advised by counsel to decline to answer because my answer might incriminate me.

Q. Mr. Johnson, I understand your testimony before the Grand Jury to be that all the books and records which you had in your possession have been turned over to your counsel? A. I decline to answer, sir, for the same reason.

Q. Mr. Johnson, you have already so testified, is that not correct? A. I decline to answer this question, sir, for the same reason.

Mr. Bjork: Would you instruct the witness.

The Foreman: For the seventh time, you are directed to answer the question.

The Witness: Sir, I have been instructed by my counsel to decline to answer, because my answer might incriminate me.

Mr. Bjork: Mr. Foreman, at this time would you instruct the witness to return to the Grand Jury, at Room 609, at ten-thirty a.m., on Thursday, May 9th.

The Foreman: Did you understand the statement?

The Witness: Will you repeat it to me, please.

The Foreman: You are directed to appear here Thursday, May 9th, at ten-thirty, in this room.

The Witness: Thursday, May 9th?

The Foreman: Will you do that?

The Witness: Yes, sir, I will.

The Foreman: You agree to it?

The Witness: Yes, sir, I do.

Mr. Bjork: That will be all.

The Witness: Thank you very much.

(Witness excused)

Government's Exhibit 6

STATE OF NEW YORK
DEPARTMENT OF STATE } ss.:

I DO HEREBY CERTIFY that a certificate of dissolution of BRAKES, INC. has been filed in this department this day and that it appears therefrom that such corporation has complied with section one hundred and five of the Stock Corporation Law, and that it is dissolved.

GIVEN IN DUPLICATE under my hand and official seal of the Department of State, at the City of Albany, this eighteenth day of April, one thousand nine hundred and fifty-five.

CARMINE G. DESAPIO
Secretary of State

By SAMUEL LONDON
Deputy Secretary of State

CN. JAN 4, 1916 -.

M. LANDSMAN DELIVERED TO ROOM 431 FED. CT. HOUSE, FOLEY SQ: -- THE FOLLOWING BOOKS - BELONGING TO BERKELINE PURSUANT TO SUBPOENA. —

1. GENERAL JOURNAL JAN 47' - DEC 54' (2 VOL.)

2. GENERAL LEDGER JAN 52 - DEC 54 (1 VOL).

3. ACCTS. REC. LEDGER CARDS DEC 51' - JAN 54' (5 CARDS)

4. CASH DISBURSEMENTS JUNE 52 - DEC 53 (1 VOL)

5. CASH RECIEPTS JUNE 51 - DEC 53 (1 VOL)

4. CASH DISBURSEMENTS JUNE 52 - DEC 53 (1 VOL)

5. CASH RECIEPTS JUNE 52 - DEC 53 (1 VOL)

6. SALES JOURNAL JAN 50 - DEC 53 (1 VOL + LOOSE SHEETS)

Received above items on Jan. 4, 1955 from Mr. Landeman.

C. J. Hallinan Jr.
Assistant US Attorney

GX. 16
5/15/57
LB

Government's Exhibit

On Jan 4, 1956—

M. Landsman delivered to Room 431 Fed. Ct. House, Foley Sq.—the following books belonging to Brakes Inc pursuant to subpoena.—

1. General Journal Jan '47'—Dec '54' (2 vol.)
2. General Ledger Jan 52—Dec 54 (1 vol)
3. Accts. Rec. Ledger Cards Dec '51'—Jan '54' (5 cards)
4. Cash Disbursements June 52—Dec 53 (1 vol)
5. Cash Receipts June 52—Dec 53 (1 vol)
6. Sales Journal Jan 50—Dec 53 (1 vol & loose sheets)

Received above items on Jan. 4, 1955 from Mr.Landsman.

C. J. HALLINAN, JR.
Assistant U S Attorney

Order of Judgment and Commitment Appealed From

(288) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

A Grand Jury of this Court having applied for a direction to Lawrence Johnson, as President of Brakes, Inc., a New York corporation voluntarily dissolved on April 2, 1955, to produce certain books and records, called for by certain subpoenas duces tecum issued by the Clerk of this Court, dated November 18, 1955, and May 2, 1957, of said corporation, of which Lawrence Johnson was President, a Director, and the sole stockholder on the date of its dissolution, and oral argument having been heard in connection with said application, at which argument Lawrence Johnson appeared with counsel in opposition thereto, and this Court having directed Lawrence Johnson to produce the books and records set forth in said subpoenas duces tecum, and Lawrence Johnson having failed to produce said books and records, and notice having been duly given in open court that a hearing would be conducted to ascertain whether Lawrence Johnson was in contempt of Court for having failed to produce said books and records, and said hearing having been held in the presence of Lawrence Johnson and his counsel, William Kleinman, Esq., and, after the taking of testimony and the hearing of argument and after due deliberation, the Court having concluded that the witness (289) Lawrence Johnson at the time of service of the said subpoenas duces tecum and at all times thereafter was in possession of, or had control of, subject to his direction, all of the books and records called for in said

subpoenas duces tecum, and that the action and conduct of the witness in failing to produce said records in compliance with the lawful order of this Court was willful and contumacious and constituted a criminal contempt, it is hereby

ORDERED, ADJUDGED AND DECREED that pursuant to the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure, the said Lawrence Johnson be and he hereby is, adjudged guilty of a criminal contempt of this Court and is hereby committed to the custody of the Attorney General or his authorized representative for a period of sixty (60) days, unless he shall purge himself of such contempt by producing the aforesaid books and records before this Court on or before May 27, 1957, or is otherwise discharged according to law, and

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or another qualified officer, and that said copy serve as the commitment of the defendant.

Dated: New York, N. Y.
May 28, 1957.

LAWRENCE E. WALSH
U. S. D. J.

On 5-27-57 Defendant Johnson was released in custody of his attorney, Mr. Kleinman, pending appeal, provided said appeal is perfected by June 6, 1957.

Notice of Appeal

(290) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Cr. 153-38

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that Lawrence Johnson, the defendant herein, hereby appeals to the United States Court of Appeals for the Second Circuit, from the judgment of conviction and sentence of 60 days imprisonment imposed against him by Hon. Lawrence E. Walsh, District Judge, on May 21, 1957, for violation of Title 18, United States Code, Section 401 (contempt).

Dated: New York, New York
May 27, 1957

WILLIAM W. KLEINMAN
Attorney for Defendant
Office & P. O. Address
66 Court Street
Brooklyn 1, New York

To:

PAUL W. WILLIAMS, Esq.
U. S. Attorney for the Southern District of N. Y.
Attorney for United States of America
United States Court House
Foley Square
New York 7, New York

CLERK OF UNITED STATES DISTRICT COURT
Southern District of New York

SUPREME COURT U.S.

No. 418

Argued by ROBERT W. BJORK

Office - Supreme Court, U.S.
FILED
AUG 30 1957
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

C 153–38

UNITED STATES OF AMERICA,

Appellee,

–v–

LAWRENCE JOHNSON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[redacted]FOR THE UNITED STATES OF AMERICA
[redacted] APPENDIX

PAUL W. WILLIAMS,
United States Attorney for the
Southern District of New York,
Attorney for United States of America.

ROBERT W. BJORK,
ARTHUR B. KRAMER,
Assistant United States Attorneys,
Of Counsel.

INDEX TO APPENDIX

GOVERNMENT'S EXHIBITS

PAGE

5—24 Certificates of Compliance and Analysis submitted to N. Y. Ordnance District, 180 Varick St., N. Y. C. by Brakes, Inc. marked in evidence at page 42 of Appellant's Appendix (one representative certificate is reproduced) 3a

6—Certificate of Dissolution of Brakes, Inc. marked in evidence at page 46 of Appellant's Appendix 5a

7—Purchase Order of Brakes, Inc. "L No. 8180" placed with Elmhurst Rubber Co. relating to material called for in Contract DA-20-089-ORD-12442 FS marked in evidence at page 60 of Appellant's Appendix 11a

Government's Exhibit 5

(3a)

CERTIFICATE OF COMPLIANCE AND ANALYSIS

PROCUREMENT ORDER No.	PURCHASE ORDER No.
	DA 20-11 3 ORD 9218

THIS IS TO CERTIFY THAT (Item name and number)
5 SPRING HYD SLAVE CYLINDER PISTON OUTER

TO:

N.Y. ORDNANCE DISTRICT
180 VARICK ST.
N. Y. C.

LOT NUMBER	SHIPPED (Month, Day, Year)
	9 " 53
SHIPPED VIA	**CAR INITIALS AND No.**
ACME FAST FRT	
WEIGHT (Total Net Pounds)	**B/L NUMBER**
100	WY 2876647

CONSIGNED TO	SHIPPING ORDER No.	DELIVERY ORDER No.	QUANTITY
ANNISTON ORD DEPOT			200

BOXES NUMBERED	ITEM NUMBERS	MARKED	MEETS ALL THE REQUIREMENTS OF CONTRACT No
1	√		

IT IS FURTHER CERTIFIED THAT THE FOLLOWING IS AN ANALYSIS OF THE ABOVE MATERIAL, COVERING DETAILED REQUIREMENTS OF APPLICABLE SPECIFICATION NUMBER _____ DATED _____ AND _____

LIST APPLICABLE AUTHORIZED WAIVERS AND CHANGES

TEST PRESCRIBED	SPECIFICATION LIMITS.		ANALYTICAL RESULT
	MAXIMUM	MINIMUM	

Government's Exhibit 5

24 Certificates of Compliance and Analysis submitted to N. Y. Ordnance District, 180 Varick St., N. Y. C. by Brakes, Inc.

(OFFSET)

[*For convenience of Court and Counsel one example of the certificates comprising this Exhibit is bound in on the opposite page.*]

Government's Exhibit 6 (5A)

[redacted]

Certificate of Dissolution of

BRAKES, INC.

Pursuant to Article Ten of the Stock Corporation Law (Section 105, of the Stock Corporation Law), we the undersigned, being holders of record of all the outstanding shares of the capital stock of the **BRAKES, INC,**
entitled to vote on the dissolution of the corporation.

Certify

I. That the name of the corporation is **BRAKES, INC.**

II. That the certificate of incorporation of said corporation was duly filed in the office of the Secretary of State on the 4th *day of* June *19* 42 *and the duplicate original certificate of incorporation was filed in the office of the Clerk of the County of* Queens *on the* 6th *day of* June *19*42.

III. That the said corporation elects to dissolve

IV. That the names and post-office addresses of the directors are:

Names	*Post-office Addresses*
CHARLES LIBBY	37-16 Queens Blvd., L.I.C., N.Y.
LAWRENCE JOHNSON	37-16 Queens Blvd., L.I.C., N.Y.
WILLIAM STEVENS	37-16 Queens Blvd., L.I.C., N.Y.

CHARLES LIBBY		37-16 Queens Blvd., L.I.C., N.Y.
LAWRENCE JOHNSON		37-16 Queens Blvd., L.I.C., N.Y.
WILLIAM STEVENS		37-16 Queens Blvd., L.I.C., N.Y.

V. That the names, titles and post office addresses of the officers of the corporation are:

Names	*Titles*	*Post-office Addresses*
LAWRENCE JOHNSON	President	37-16 Queens Blvd. L.I.C., N.Y.
CHARLES LIBBY	Secretary & Treasurer	37-16 Queens Blvd. L.I.C., N.Y.

In Witness Whereof, *we have made and subscribed this certificate in triplicate this* 14 *day of* February 1955

Lawrence Johnson (L. S.)

(L. S.)

(L. S.)

SEE INFORMATION
(Sec. 105, Subd. 6 and 7,
Stock Corp. Law).

1093/1-5/

STATE OF NEW YORK,
CITY OF NEW YORK
COUNTY OF QUEENS } ss.:

(7A)

On this 14th day of [illegible] 1955, before me personally came and appeared LAWRENCE JOHNSON

and ..... to me known and known to me to be the individuals described in and who executed the foregoing certificate, and they duly and severally acknowledged to me that they executed the same.

[signature]

.....

STATE OF NEW YORK,
CITY OF NEW YORK
COUNTY OF QUEENS } ss.

LAWRENCE JOHNSON and CHARLES LIBBY

being severally and duly sworn each for themselves depose and say: That they are respectively the

NUMBER _____ DATED _____

LIST APPLICABLE AUTHORIZED WAIVERS AND CHANGES

TEST PRESCRIBED	SPECIFICATION LIMITS		ANALYTICAL RESULT
	MAXIMUM	MINIMUM	

REMARKS

I certify material listed hereon is in strict accordance with the manufacturers specification for the manufactured parts listed hereon, all requirements of the contract and specifications, and the parts are interchangeable for the end item intended.

NAME OF COMPANY BRAKES, INC.
37-16 QUEENS BLVD.
L. I. CITY, N. Y.
STillwell 4-6417

NAME AND TITLE OF OFFICIAL
Charles Lebby V.P.

DATE
9/24/53

STATE OF N Y
COUNTY OF QUEENS SS

Subscribed and sworn to before me, a Notary Public in and for the State and county aforesaid, this the
24 day of 9/24 1953

NOTARY SEAL

LAWRENCE JOHNSON
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-1982300
Qualified in Queens County
Cert. filed with Queens Co. Clerk & Reg.
Term expires March 30, 1955

Lawrence Johnson
Notary Public
MY COMMISSION EXPIRES

DA AGO FORM 1 MAR 51 694

REPLACES WD AGO FORM 694, 7 AUG 44, WHICH MAY BE USED

16—41622-1 U. S. GOVERNMENT PRINTING OFFICE

Government's Exhibit 6

Certificate of Dissolution of Brakes, Inc.

(OFFSET)

[*For convenience of Court and Counsel the three pages comprising this Exhibit are bound in on the opposite pages.*]

Page 1 of Certificate

Government's Exhibit 6 (Continued)

Page 3 of Certificate

(9a)

CT (10-53)

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
CORPORATION TAX BUREAU
ALBANY 1, N. Y.

Pursuant to the provisions of Section 105 of Article 10 of the Stock Corporation Law, the STATE TAX COMMISSION hereby consents to the filing of the certificate of dissolution of Braker, Inc.

Dated 4-18-55

This consent good only to 4-29-55

STATE TAX COMMISSION

By Arthur M. Sundlach
Deputy Tax Commissioner

S993-105-3

STATE OF NEW YORK,
CITY OF NEW YORK
COUNTY OF QUEENS } ss.:

LAWRENCE JOHNSON and CHARLES LIBBY

being severally and duly sworn each for themselves depose and say: That they are respectively the president and secretary of BRAKES, INC. , the above named corporation; that the persons who have subscribed the foregoing certificate, in person or by proxy, constitute the holders of record of all of the outstanding shares of the corporation entitled to vote thereon.

Sworn to before me this
day of February 1955

Lawrence Johnson

Charles Libby

Government's Exhibit 7

Purchase Order.

(OFFSET)

[For convenience of Court and Counsel this Exhibit is bound in on the opposite page.]

BRAKES INC.
~~37-16~~ QUEENS BLVD.
LONG ISLAND CITY, N. Y.
STillwell 4-6417

PURCHASE ORDER

L Nº 8180 3/14

THIS ORDER NUMBER MUST APPEAR ON YOUR INVOICE

TO Edmont Rubber Co.

PHHS Ex E-B-3102 2/53 194 1
6/2/54
R.B.

SHIP VIA

Please enter our order for goods entered below:

QUANTITY	DESCRIPTION	PRICE	DISC.	NET
4,424 ~~pr~~	Detroit Ordnance Cat. Re. Tes			
2500 — 6" Dia	Contract # DA-20-089-ORD			
600 ea 2000 — 8" Dia	12442 FL			
10,000 — 220 Washers. 213630	27.85M — Comp. 30-42			
	Stage for Comp			

Deliver no goods without a written order

BRAKES INC.

BY

Government's Exhibit 7

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 30 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 418

LAWRENCE JOHNSON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL H. GREENBERG
Counsel for Petitioner
15 Park Row
New York 38, New York

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Statute Involved	2
Power of Court	2
Statement of the Case	3
Proceedings Below	3
The Record	3
The Facts	3
Reasons for Granting the Writ	12
Conclusion	16
Appendix	17

CITATIONS:

Cases:

Arctic Leather Garment Co., In re, 89 F. 2d 871	15
Cole v. Arkansas, 333 U. S. 196, 202	16
Curcio v. United States, 354 U. S. 118	2, 12, 13, 16
Lopiparo v. United States, 216 F. 2d 87	15

PAGE

Maryland & Virginia Milk Producers Ass'n, Inc. v. United States, 193 F. 2d 907, 917 14

Nilva v. United States, 352 U. S. 385 14

Pennsylvania Railroad Co. v. Chamberlain, 288 U. S. 333 14

Traub v. United States, 232 F. 2d 43, 48 15

United States v. Fleischman, 339 U. S. 363 ..... 13, 14, 15
United States v. Goldstein, 105 F. 2d 150 15
United States v. Gordon, 236 F. 2d 916, 920 16
United States v. Patterson, 219 F. 2d 659 (C. A. 2d) 14, 15
United States v. White, 322 U. S. 694 ..... 13, 14

Wilson v. United States, 221 U. S. 361 ..... 13, 14

Other Authorities:

United States Code:
Title 18, Section 371 11
Title 18, Section 401(c) 2
Title 18, Section 1001 11
Title 28, Section 1254(1) 1

Wigmore, Evidence (3d Ed.) ¶2511 14

IN THE

Supreme Court of the United States

October Term, 1957.

No. .....

LAWRENCE JOHNSON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Lawrence Johnson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on August 6, 1957.

Opinion Below

The opinion of the Court of Appeals in this proceeding has not yet been reported. This opinion is set forth as an Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on August 6, 1957. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

The questions presented in this case relate to the conflict of the decision of the Court of Appeals in this case with

the decision of this Court in *Curcio* v. *United States*, 354 U. S. 118; to the sufficiency of the evidence supporting the district judge's finding that certain non-produced records of a dissolved corporation continue to exist and the duty of petitioner as former president of said corporation to produce such records before a grand jury or be adjudged in criminal contempt; and to the sufficiency of petitioner's showing of good faith compliance with the direction of the district court to produce said records and that all such existing records have been produced.

Statute Involved

The statute involved in this case is Title 18, United States Code, Section 401(c), which reads as follows:

Power of Court

A court of the United States shall have power to punish by fine and imprisonment, at its discretion, such contempt of its authority, and none other, as—

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. (June 25, 1948, ch. 645, ¶ 1, 62 Stat. 701.)

STATEMENT OF THE CASE

Proceedings Below

Petitioner Lawrence Johnson was convicted of criminal contempt of court in the District Court for the Southern District of New York, for failing to produce before a grand jury, in response to two subpoenas *duces tecum*, certain corporate books and records of Brakes, Inc., a dissolved corporation of which petitioner had been president. On May 21, 1957 petitioner was adjudged in contempt and sentenced to 60 days imprisonment; he was paroled in the custody of his attorney pending appeal and he remains under this parole pending review by this Court. The district court held that the non-produced books and records continued to exist at the time the subpoenas were served and that petitioner's efforts to purge himself of the contempt were insufficient. The Court of Appeals affirmed this finding on August 6, 1957, but stayed its mandate pending review in this Court.

The Record

The record of this case before the Court of Appeals was a printed appendix containing all of the proceedings of the district court, and a certified copy of this appendix and the opinion of the Court of Appeals is submitted with this petition.[1]

The Facts

Brakes, Inc. was a New York corporation engaged in performing certain government contracts for the New York office of the Ordnance Department of the Army (57-59).

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[1] Wherever numbers in parentheses are indicated, they refer to pages in this printed Appendix.

These contracts provided for Brakes, Inc. furnishing certain automotive brake parts of the Ordnance Department. The last of these contracts was completed in about April 1954 (69), and in about October 1954 Brakes, Inc. went out of business (97). It was formally dissolved on April 18, 1955 (196).

Brakes, Inc. was in the business of supplying and repairing brakes and brake parts. There were about five different "Brake" corporations (96) in several different locations, but all these corporations were affiliated or related. Brakes, Inc. maintained New York City and Long Island City locations, with about 30 to 40 people working in the Long Island City location. There were many other employees in the other locations (69, 72, 88).

Petitioner Lawrence Johnson was the president and sole stockholder of Brakes, Inc. (190-191). As such he was its chief executive officer and nominally responsible for its affairs and its books and records. Brakes, Inc. did a gross annual business of $500,000, dealing with several hundred customers per month.

In about August 1954 the Federal Bureau of Investigation undertook an investigation of Brakes, Inc. and Agent Anthony Scudari was assigned to this investigation (49, 52). He visited the Long Island City plant of Brakes, Inc. during 1954, but made no inquiry during this visit as to any books and records of the corporation. This was the only visit by any government agent to Brakes, Inc. During this visit Scudari spoke to a Mr. Libby and to Mrs. Ilse Hammerstein, but he asked them for no books and records, since he was not interested in them at that time (53).

At about Labor Day 1954 Brakes, Inc. gave up its New York City office, moving all of its New York records to the Long Island City plant (78); actually records were stored at both places prior to this move. During the summer of

1954 a fire occurred at the Long Island City plant destroying certain property in the second floor storeroom, the exact nature of which is not certain. There also had been a previous fire in the basement of this location. Records had been kept both in the basement and the second floor storeroom, for records were found in both places (89).

Early in 1954 the Bendix-Westinghouse Automotive Air Brake Company brought suit against Brakes, Inc. and Lawrence Johnson. During this litigation representatives of Bendix-Westinghouse came to the offices of Brakes, Inc. at the New York City plant to look at books, documents and records. They took photographs of the premises and all of the files and records of Brakes, Inc. were submitted for inspection and copying by these representatives, which took some days to complete. A great many records were turned over to these representatives but no record was kept of what was taken and what returned (106-107). This litigation was settled by stipulation of the parties dated January 27, 1955 (107).

On or about November 25, 1955 a subpoena *duces tecum* addressed to Brakes, Inc. at Long Island City was served on Mrs. Hammerstein, the head bookkeeper of the firm, who believed then that she had been its secretary and treasurer (76-77, 184-185), and she informed the deputy marshal making the service that the corporation had previously been dissolved (97); nevertheless she accepted service of the subpoena and forwarded it to the firm's attorneys (78). In response to this subpoena, at petitioner's direction, Mrs. Hammerstein made a search and gathered together whatever books and records of Brakes, Inc. she could find and these were delivered to the attorneys (101-102, 110-113), who in turn delivered them on January 4, 1956 to the Assistant United States attorney then in charge of the case (197).

This first subpoena called for the production of books and records relating to the Ordnance Department contract with Brakes, Inc. dated June 30, 1952, numbered DA-20-113-ORD-9981. The requested records were:

1. All sales and purchase invoices;
2. All inventory records;
3. Production records;
4. Cash disbursement journal; cash receipts journal;
5. General ledger and general journals;
6. Sales journals and purchase journals;
7. All receipts, memoranda, correspondence relating to above contract (184-185).

The delivered records consisted of:

1. General Journal—Jan. '47-Dec. '54—2 vols.;
2. General Ledger—Jan. '52—Dec. '54—1 vol.;
3. Accounts Receivable—Dec. '51—Jan. '54—5 cards; Ledger Cards
4. Cash Disbursements—June '52—Dec. '53—1 vol.;
5. Cash Receipts—June '52—Dec. '53—1 vol.;
6. Sales Journal—Jan. '53—Dec. '53—1 vol. and loose sheets.

Thus under this first subpoena nearly all the records requested were furnished. The omitted records relating to this single contract were sales and purchase invoices, inventory records, production records, purchase journals and receipts and miscellaneous memoranda and correspondence.

It is conceded that there never were any inventory records or production records maintained by Brakes, Inc., and the

district judge so found (152). There was apparently no specific purchase journal kept (79), although the district judge found that purchase journals up to September 1954 (one month before this firm went out of business) were produced, and sales journal up to December 1953 (four months before the lost government contract was completed) was produced (153).

Following the delivery of the books and records under this subpoena on January 4, 1956, nothing further was requested by government agents or attorneys. No one was called before the grand jury to authenticate the records produced or to explain any failure to produce the records which were not produced.

It is significant to observe that this first subpoena was served approximately 13 months after Brakes, Inc. went out of business; 8 months after it was formally and legally dissolved; and 20 months after completion of the last of the government contracts, which was not necessarily the contract described in the subpoena, for it is not known when this particular contract was completed and which of these many government contracts was the last one completed in April 1954. No question of a failure to produce records under this subpoena was raised until May 1957, an additional 17 months later, when petitioner was held to be in criminal contempt under it.

On May 3, 1957, a second subpoena *duces tecum,* addressed to "Lawrence Johnson, President" of Brakes, Inc. was served on petitioner (186-187). This subpoena called for the production before the grand jury of many of the same items listed in the first subpoena and previously produced, as well as certain other records. This subpoena also called for records relating to thirteen government contracts, in-

cluding the one referred to in the first subpoena (186-187).[2]

The only additional records requested were copies of the contracts and certificates of compliance and analysis: the other records had already been called for by the first subpoena, but may be considered to be enlarged in scope to cover the additional contracts listed.

A search of the premises of Brakes, Inc., now being operated by Brake Center, Inc., resulted in a few additional records being produced. Mrs. Hammerstein conducted this search for records under the direction of both petitioner and the grand jury (87-88, 101-103). Petitioner himself also made a search (6-10), and whatever was found was turned over to the government.

The non-produced records substantially are:

1. Copies of the contracts;
2. Sales and purchase invoices;
3. Certificates of compliance and analysis;
4. Receipts, memoranda and correspondence, which was interpreted to include "accounts receivables ledger cards" (152).

The produced records covered generally the periods ending either December 1953 or December 1954, which are dates fairly close to the completion of the last of the government contracts in April 1954, or to Brakes, Inc. going out of business in October 1954 or its legal dissolution in April 1955.

Again it is significant to observe that the non-produced records relating to the listed government contracts were called for in this second subpoena approximately 31 months

---

[2] The contract numbers are set forth fully in the subpoena, but their last or identifying numbers are 11841, 12442, 20591, 20596, 611, 4693, 5057, 6740, 7441, 8439, 9228, 9981, 12244.

after Brakes, Inc. went out of business; 25 months after it had been legally dissolved; and 37 months after the completion of the last of the government contracts.

Petitioner was never shown to have had personal possession or direct supervision of any of the records called for in either one or both subpoenas (37-38, 188). Nevertheless, he was adjudged in criminal contempt for wilfully and contumaciously failing to produce the non-produced records of this dissolved corporation. The theoretical basis of this wording is that petitioner as former president of this dissolved corporation continued to have "legal" control over these records (158). The practical reason given for this contempt adjudication is the fact that records which were found and produced were found in the Long Island City plant of Brake Center, Inc., the former office of Brakes, Inc., where petitioner was still "boss" (158).

This contempt proceeding was commenced in the district court "with respect to the refusal [of petitioner] to answer questions as to the whereabouts of other books and records" (4). Subsequently the district judge directed that petitioner produce the non-produced records (41), and evidence touching on the possible existence of these records was then taken. The testimony taken in the hearings following the court's direction fails to show the existence of the non-produced records at the time of the service of the subpoenas. It is apparent from the testimony of the witnesses called by the government that whatever records could be found were delivered in response to the subpoenas, and that there are no other records in existence and none in the possession of or under the control of petitioner.

Only two witnesses were called who could possibly have any knowledge of the existence of the non-produced records. They were Frank Jaegler, a former employee of Brakes,

Inc. and Mrs. Ilse Hammerstein, the former head bookkeeper.[3]

Jaegler testified that he worked on the government contracts until they were completed in April 1954 and he maintained a file of contracts and compliance certificates. He last saw these records in April 1954 when he was transferred from the New York to the Brooklyn plant of Brakes, Inc. He quit his job in October 1954 by not returning to work after a vacation. He testified many people had access to these records, but between April and October 1954 he never had occasion to look into the record file. He had no knowledge about any of the records subpoenaed (56-73).

Mrs. Hammerstein was the principal government witness in this proceeding (74-126, 164-170). The district judge stated that his finding was based "largely upon the testimony of Mrs. Hammerstein who impressed me as a very intelligent witness" (153). Mrs. Hammerstein testified that she gathered together all the records she could find and that these were delivered to the attorneys. The substance of her testimony was that there were no other records in existence other than those produced (87-89). Also, at the time of the Bendix-Westinghouse litigation many records were not returned to their proper places (93). Later at the direction of the grand jury she made a further search for records, producing a few odds and ends found in old and disused files in the storage room (89). She also detailed the types of records formerly kept by Brakes, Inc. and its method of keeping records prior to the Labor Day 1954 move to Long Island City from New York. In the Long Island City plant there was less room for keeping records and besides, Brakes, Inc. soon went out of business.

---

[3] In all, four witnesses were called by the government, the other two being Anthony Scudari, the FBI agent (49-55), and Harold [illegible] (127-130), an Internal Revenue agent. They had no knowledge of the facts in issue in this case.

As a government witness the government is bound by Mrs. Hammerstein's testimony; and this testimony does not support the district court's finding of continued existence of the records. Instead it supports and corroborates petitioner's own grand jury testimony that whatever was in existence was produced for the government.

Petitioner's testimony in this proceeding consisted of his grand jury testimony; he did not testify as a witness in the contempt hearings themselves. The substance of this testimony was that all the records which would be found were produced; that petitioner had none in his personal possession or under his control; that he did not personally supervise these records but that his office took care of them.

At the time of this proceeding petitioner had been arrested on a criminal complaint before the United States Commissioner and released in $5,000 bail on a charge of violation of Title 18, United States Code, Section 1001 (149, 161). Since these proceedings petitioner and others have been indicted in the district court in nine counts of false statements and conspiracy to defraud the United States (Title 18, United States Code, Secs. 1001, 371).[4]

The examination of petitioner before the grand jury discloses a concerted effort on the part of the prosecutor to compel petitioner to incriminate himself. Petitioner invoked his privilege against self-incrimination many times and the contempt proceeding was commenced with "respect to the refusal to answer questions as to the whereabouts of other books that we seek your [the court's] aid" (4).

---

[4] This pending indictment names as defendants Brakes, Inc., Lawrence Johnson, Charles W. Libby, Joseph L. Wittman and Archie Stevens, and bears Docket No. C 153-171.

Reasons for Granting the Writ

The decision of the Court of Appeals below conflicts with the decision of this Court in *Curcio* v. *United States*, 354 U. S. 118, and other decisions both of this Court and other courts. The district judge's finding that the non-produced corporate records continue to exist is not supported by the evidence of record in the contempt hearings. Moreover, petitioner sufficiently showed in good faith both his attempted compliance with the direction of the district court to produce these records and that all existing records had been produced.

1. In *Curcio* v. *United States*, 354 U. S. 118, this Court directed entry of a judgment of acquittal of a defendant who failed to produce any of the subpoenaed records of which he was custodian. There Curcio refused to answer questions put to him before the grand jury touching upon his knowledge of the whereabouts of union books and records of which he was nominal or legal custodian, and at no time did he produce any of the subpoenaed records. Curcio stated simply that he did not have these records in his personal possession. This Court pointed out that a custodian of records cannot be held in contempt for refusing to answer questions concerning the whereabouts of non-produced records. This Court also pointed out in footnote 7 of its opinion that "petitioner might have been proceeded against for his failure to produce the records demanded by the subpoena *duces tecum*"; however instead of remanding the case for further proceedings on this ground or affirming the conviction for the bare non-production of the records, it directed Curcio's acquittal.

In the present case petitioner asserted his privilege against self-incrimination as to certain questions put to him before the grand jury, with the contempt proceeding being brought to compel him to answer these questions (4).

These questions touched on petitioner's knowledge of the whereabouts of the few non-produced records; or if he destroyed them or knew of their destruction (190-195, 188-189, 6-10, 13-18). The district judge held petitioner in contempt for the non-production of records without reference to the refusal to answer questions.

In light of the decision in *Curcio* and the cases on which it is based (*Wilson* v. *United States*, 221 U. S. 361; *United States* v. *White*, 322 U. S. 694, among others), it is apparent that the court below erred in failing to follow it.

2. The finding by the district judge that the non-produced records continue to exist is not supported by the evidence of record in the contempt hearings. Mrs. Hammerstein's testimony clearly negates this finding since her testimony repeatedly was to the effect that all the records which could be found were produced, and the government is bound by her testimony as she was its witness. Petitioner's grand jury testimony that he had none of these records in his personal possession, that the office people took care of the records and that all existing records were produced, also is not contradicted in the slightest regard.

In criminal contempt cases the usual rules of burden of proof and presumption of innocence of defendants continue. *United States* v. *Fleischman*, 339 U. S. 363. The burden of proof was at all times on the government in this case to prove beyond a reasonable doubt each element of the crime of criminal contempt. The presumption of innocence also attaches to petitioner in this case, as in any criminal case. It is in regard to these fundamental rules that the district judge's finding must be assessed. He stated in his oral finding it was his belief that the missing records continue to exist (152). This finding was based solely on a presumption of the continued existence of these non-produced records more than three years after any of these records were last seen, and it is not warranted by the evidence.

The question then becomes whether this presumption of continued existence of these records, which is the sole basis for the adjudication of criminal contempt here, is to overcome the presumption of innocence protecting petitioner. In the absence of direct proof that the non-produced records in this case actually continue to exist, the facts of record require a finding that the government has not met its burden of proof of petitioner's guilt beyond a reasonable doubt so as to overcome petitioner's presumption of innocence. In a clash between these two presumptions the presumption of innocence is stronger and must prevail. See *United States* v. *Fleischman*, *supra*, p. 363, footnote 10 and cases there cited; Wigmore, Evidence (3d Ed.) ¶ 2511.

Since the presumption of continued existence of the records may be considered a species of circumstantial evidence, such circumstantial evidence would be insufficient evidence of guilt for it would not exclude every reasonable hypothesis of innocence, such as the hypothesis that these records are no longer in existence. *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333; *Maryland & Virginia Milk Producers Ass'n, Inc.* v. *United States*, 193 F. 2d 907, 917.

This is not the case of a failure or refusal to produce records which are shown to exist or are concededly in existence. See *Nilva* v. *United States*, 352 U. S. 385; *United States* v. *Fleischman*, *supra*; *United States* v. *White*, *supra*; *Wilson* v. *United States*, *supra*. This case more clearly resembles the case of *United States* v. *Patterson*, 219 F. 2d 659 (C. A. 2d), where the Court of Appeals stated:

> "The defendant can here legally be jailed only for a contempt in failing to produce the sought-after books when they are fairly shown to be presently within his power and control."

In the *Patterson* case the records sought were last shown to be in existence fourth months prior to the service of the subpoena; the contempt conviction was reversed under the circumstances of the case. Other cases where the presumption of continued existence of the records was held sufficient are *United States* v. *Goldstein*, 105 F. 2d 150 (11 days); and *In re Arctic Leather Garment Co.*, 89 F. 2d 871 (six weeks). In no case has a three year period been permitted as a basis for sustaining the presumption of the continued existence of records. And in this case the corporation whose records were sought had completed all government contracts in question and was both out of business and legally dissolved for periods of time up to 37 months before the contempt proceedings in May 1957.

3. Petitioner sufficiently showed in good faith both his attempted compliance with the district court's direction to produce these records and that all existing records had been produced in compliance with the subpoenas. Although the burden of proof does not shift to a defendant in a contempt case to prove his good faith compliance with the demands of the subpoena (*United States* v. *Fleischman*, *supra*, p. 363), nevertheless such defendant does have a burden of coming forward with proof to negate or refute the *prima facie* case made out by the prosecution. In this case the government never proved its case *prima facie;* and petitioner did show clearly that he had in good faith complied with the requirements of the subpoenas and the court's direction. *United States* v. *Patterson*, *supra*, p. 662; *Traub* v. *United States*, 232 F. 2d 43, 48. *Lopiparo* v. *United States*, 216 F. 2d 87, relied on much by the government and the court below is not authority contrary to petitioner's position here.

Since the government here started the contempt proceeding on the theory of petitioner's wrongful claim of personal

privilege as to questions touching his knowledge of the whereabouts of the non-produced records, its later shift to a contempt for failing to produce the few non-produced records, cannot be permitted to stand. *Curcio* v. *United States, supra; Cole* v. *Arkansas,* 333 U. S. 196, 202.

Finally, the failure of petitioner to produce the small number of records charged against him cannot be deemed wilful and contumacious, since there was substantial compliance with the subpoenas, and petitioner was never shown to have personal possession, direction or control over these non-produced records. See *United States* v. *Gordon,* 236 F. 2d 916, 920.

It is respectfully submitted that for the foregoing reasons this case warrants review by certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

August 30, 1957

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 398—October Term, 1956.

(Argued June 14, 1957 Decided August 6, 1957.)

Docket No. 24676

UNITED STATES OF AMERICA,

Appellee,

—v.—

LAWRENCE JOHNSON,

Appellant.

Before:

CLARK, *Chief Judge,*
CHASE and HINCKS, *Circuit Judges.*

Appeal from a judgment of the District Court for the Southern District of New York. Walsh, *Judge.* Affirmed.

Under the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure, the appellant was adjudged guilty of a criminal contempt of the court because of his willful failure to produce books and records pursuant to grand jury subpoenas *duces tecum* and was sentenced to imprisonment for sixty days. The sentence was not to be served if he purged himself from the contempt by producing the books and records before a day certain. He failed so to do; was ordered committed; and released in the custody of his attorney pending this appeal.

PAUL W. WILLIAMS, *U. S. Attorney for Appellee* (Robert W. Bjork, Arthur B. Kramer, Asst. U. S. Attorneys, of Counsel).

WILLIAM W. KLEINMAN, *Attorney for Appellant* (William W. Kleinman, Daniel H. Greenberg, Seymour J. Shapiro, of Counsel).

CHASE, *Circuit Judge*:

In 1955, and before, the appellant was the sole stockholder, a director and the president, of Brakes, Inc., a New York corporation a part of whose business was done under contracts with the government. In November 1955, a federal grand jury in the Southern District of New York was investigating charges that Brakes, Inc., had submitted to the government false statements relating to the performance of those contracts and a subpoena *duces tecum* calling for the production of designated books and records concerning one of the contracts was, on November 18, 1955, served on the person who told the marshal that she was the secretary-treasurer of the corporation. Though she was mistaken, no point is made as to any defect in the service of that subpoena and some, though not all, of the books and records called for were produced in response to it.

On May 2, 1957, while another grand jury was continuing the investigation, a second subpoena *duces tecum* was served, this time on the appellant as the president of the corporation. It called for the production of books and records relating to the same contract, some of which had been specifically mentioned in the first subpoena, and some not, and for those relating to twelve other contracts with the government. There was a partial compliance with the second subpoena on May 10, 1957, but only after the appellant had appeared before the grand jury and been directed by its foreman to search for the subpoenaed records and pro-

duce them. There was a further partial compliance on May 14, 1957 after another direction by the foreman; and still another on May 27, 1957, after the appellant had been adjudged in contempt and when he was attempting to purge himself from that.

After all this, compliance with the subpoenas was still incomplete because of the failure to produce called for books and records consisting of sales invoices; purchase orders, journals and invoices; certificates of compliance, records of shipments under each contract; correspondence; both account receivable and account payable ledger cards; and cash disbursements journal for the period from January 1950 to December 1951.

The appellant did not appear at the hearings before the court which resulted in his adjudication for contempt but in his appearances before the grand jury he was examined and on several occasions refused to answer questions on the ground that his answers might be incriminating. The judge held that all such refusals were justified and, as he was not directed to answer any such questions, he was not held in contempt for refusing to testify, the contempt consisting solely in his failure to produce what was specified in the subpoenas.

As to that, the position taken by the appellant before the grand jury and the district court, and now here, is that he did his best to comply with the subpoenas but was prevented from so doing because the things which were called for and not produced were neither under his control nor in existence when the subpoenas were served.

At the time of the service of the subpoenas, Brakes, Inc., had been voluntarily dissolved, that having been formally done on April 1955. Its business had been taken over by a corporation called Brakes Center, Inc. Previously some of its books and records had been kept at the place of business it had maintained on West 35th Street in Manhattan

and some at its plant in Long Island City. After its dissolution those in Manhattan were taken to the Long Island City premises which were taken over by Brakes Center, Inc. The appellant was not an officer of the last named corporation but was employed by it as its operating manager and no point is made that he could not have produced any of the books and records because they were in the possession of Brake Center, Inc., his position being, as above stated, that he did produce all that he was able to find.

Thus the two questions which this appeal presents are (1) whether the appellant because of his above-stated connection with Brakes, Inc., was, after its dissolution, legally responsible for the production of its books and records which were subpoenaed; and (2) whether the evidence was sufficient to support the finding below that the non-produced books and records were in existence when the subpoenas were served and could have been produced by him.

The first question is one of law and need not detain us long. Before the dissolution of Brakes, Inc., the appellant, by virtue of his relationship to the corporation, was in such control of its books and records that he might have been guilty of contempt if he had willfully refused to comply with a subpoena *duces tecum* served on the corporation. *Wilson* v. *United States*, 221 U. S. 361; *Lopiparo* v. *United States*, 8 Cir., 216 F. 2d 87. Upon the voluntary dissolution of Brakes, Inc., its directors were required under New York law, New York Corporation Law, Section 106(5), to preserve the corporate records until their destruction might be permitted by the court and no such order was shown to have been entered before the subpoenas were served. Consequently, the dissolution of the corporation did not, as a matter of law, relieve the appellant from his former responsibilty in respect to his duty to comply with a subpoena *duces tecum* requiring the production of corporate records.

And so the disposition of this appeal depends in the end upon the sufficiency of the evidence to support the finding of the district judge that the non-produced books and records were in existence when the subpoenas were served and could have been produced by the appellant had he been willing to do that. This issue being such that its solution is dependent upon the specific evidence in the case under consideration, prior decisions in cases somewhat similar are in no real sense controlling. In *United States* v. *Patterson*, 2 Cir., 219 F. 2d 659, upon which the appellant much relies, decision turned on a close question of fact presented by the particular evidence in that record which was, by a divided court, held insufficient to support the findings on which the contempt judgment was based. Had the evidence been different, of course, the result on appeal might have been different. The evidence here is sufficiently different to produce a different result. There is, accordingly, no conflict in respect to legal principles between the *Patterson* case and this. Applying those stated there to the evidence here, we are satisfied that the findings below were amply supported by evidence from which the judge found that the non-produced books and records which were subpoenaed were in existence when the subpoenas were served. Admittedly there was non-compliance. The burden was then upon the appellant to show that he had in good faith tried to comply. *United States* v. *Fleischman*, 339 U. S. 349; *United States* v. *White*, 322 U. S. 694. The district judge gave him a fair and reasonable opportunity to do that and we agree with the judge's conclusion that he failed to show that he did in good faith attempt to obey the subpoenas. The absence of such a showing leaves his adjudication and sentence for contempt without error. *Nilva* v. *United States*, 352 U. S. 385.

Affirmed.

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No. 418

In the Supreme Court of the United States

OCTOBER TERM, 1957

LAWRENCE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statement	2
Argument	5
Conclusion	8

CITATIONS

Cases:

Curcio v. *United States*, 354 U.S. 118	5, 6
Grant v. *United States*, 227 U.S. 74	7
Lopiparo v. *United States*, 216 F. 2d 87, certiorari denied, 348 U.S. 916	7
Nilva v. *United States*, 352 U.S. 385	6, 7
United States v. *Fleischman*, 339 U.S. 349	6
United States v. *Patterson*, 219 F. 2d 659	7
United States v. *White*, 322 U.S. 694	6
Wheeler v. *United States*, 226 U.S. 478	7
Wilson v. *United States*, 221 U. S. 361	6

Statute:

New York Stock Corporation Law:	
Section 106(5)	6
Section 105(8)	7

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 17-21) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1957 (Pet. 17), and the petition for a writ of certiorari was filed on August 30, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports the trial court's finding of contempt for nonproduction of records.

STATEMENT

On May 21, 1957, the United States District Court for the Southern District of New York found petitioner guilty of contempt (R. 161) for failing to produce, pursuant to two grand jury subpoenas, certain records of a dissolved corporation of which he was the sole stockholder and president (R. 190-191). The contempt action was not based on petitioner's refusal to answer questions concerning the records before the grand jury but solely on his failure to produce what was specified in the subpoenas (R. 30-32, 44, 146, 159, 198-199). He was sentenced to imprisonment for sixty days "unless he shall purge himself of such contempt by producing the aforesaid books and records before this Court on or before May 27, 1957" (R. 161, 198-199). Upon his failure to produce the records, the court directed that his sentence should stand (R. 174). On appeal, the judgment was unanimously affirmed (Pet. 17-21).

The record may be summarized as follows:

In November, 1955, the grand jury began an investigation into charges that Brakes, Inc. had submitted false statements in connection with the performance of contracts with the government (R. 3). The corporation had gone out of business in October, 1954 (R. 97), and was legally dissolved on April 18, 1955 (R. 196). The business was taken over by Brake Center, Inc., at the same premises with petitioner still a "boss" (R. 76).

In November, 1955, a grand jury subpoena *duces tecum* directed to Brakes, Inc. (R. 184-185), was accepted by one Ilse Hammerstein, formerly head bookkeeper of the firm (R. 76-77), and an officer of Brake Center, Inc. (R. 76). This subpoena called for the production of certain records relating to the per-

formance of one of the corporation's government contracts (R. 184-185). Petitioner asked Mrs. Hammerstein "Are there any records" (R. 120). She gathered some together and turned them and the subpoena over to the corporation's attorneys (R. 78, 111). Some, but not all, of the records specified were produced.

On May 2, 1957, another grand jury, continuing the investigation, served petitioner with a second subpoena (R. 190) calling for the production of corporate records relating to twelve other government contracts (R. 186-187). On May 10, 1957, at the insistence of the grand jury foreman (R. 4, 6-7), petitioner produced copies of seven letters between Brakes, Inc., and the government (R. 4). On May 14, 1957, petitioner produced additional records called for in the two subpoenas after the grand jury foreman had specifically directed Mrs. Hammerstein to search for them (R. 88). A few more miscellaneous papers were produced on May 27, 1957, after petitioner had been adjudged in contempt (R. 4). The following records specified in the two subpoenas were not produced: copies of the contracts themselves; sales invoices; purchase orders; journals and invoices; certificates of compliance and analysis; records of shipments made pursuant to each contract; correspondence, account receivable and account payable ledger cards, and cash disbursements journal for the period between January, 1950, and December, 1951. When asked about the records by the grand jury, petitioner asserted that he had turned over all the records he could find and declined to answer other questions on the grounds of possible self-incrimination (R. 188-195).[1]

[1] During the contempt hearing, at which petitioner did not take the stand, the court stated: "I want to make it perfectly clear that I have no question whatever as to the position Mr. Johnson took as to any questions asked of him" (R. 159).

At the contempt hearing, Mrs. Hammerstein testified that Brakes, Inc., kept a general ledger, general journal, cash journal, a sales and purchase journal reflecting transactions with the government (R. 79), accounts receivable ledger cards (R. 113-114), and correspondence files relating to government contracts (R. 79-80, 91-92). She stated that, without exception, the corporate records were preserved for six or seven years (R. 85). Petitioner himself had testified before the grand jury that invoices were kept for at least six years (R. 134). Another employee of Brakes, Inc., until October, 1954, testified that the company had maintained a complete file on each government contract, and that these files contained copies of the contracts themselves, the certificates of compliance and analysis, and records of shipments made on the contracts (R. 57-58). He also stated that the corporation kept separate records of purchases made in connection with the performance of these contracts (R. 61). These documents, which had been subpoenaed, were not produced. These witnesses also testified that some records had been moved from one office to another (R. 77-80); that the opposing party to a civil suit in which Brakes, Inc., was involved had access to their files (R. 91-92, 106-109), but that it was believed that receipts were issued for returned files; and that two fires had occurred at the plant (R. 62-63, 70-71). No fire damage or loss of files was known to have resulted from any of these occurrences. Petitioner did not attempt to rely on these events related by government witnesses as an excuse for the non-production of the records. His counsel admitted at the conclusion of the hearing that "we have not offered any excuse for the unavailability of any of these records" (R. 131).

In finding petitioner guilty of contempt, the court was convinced beyond a reasonable doubt that the records existed when the subpoenas were served. He believed that the thorough and careful bookkeeping system calling for the keeping of corporate records for six years, as described by Mrs. Hammerstein, was inconsistent with the unexplained disappearance of substantial batches of records with respect to government transactions, and particularly with the disappearance of *all* the government invoices and contracts (R. 152-154). The court considered the ultimate production of certain sales journals called for under the first subpoena in 1955 but not produced until May, 1957, after continued prodding by the grand jury, "the most perfect proof that they existed when the subpoena was served" (R. 155). Commenting on the fact that there was no proof of any act that would cause the destruction or disappearances of the records, the court said that if any of the records had been destroyed by fire it was unbelievable that no suggestion had been made to that effect during the long course of the litigation (R. 157).

ARGUMENT

1. Petitioner's argument that his conviction was improper under the decision of this Court in *Curcio* v. *United States*, 354 U.S. 118 (Pet. 12-13), is clearly incorrect. In the *Curcio* case, this Court reaffirmed prior holdings that the books and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of the custodian, but held that a corporate custodian can lawfully invoke the Fifth Amendment with respect to questions seeking to ascertain the

whereabouts of books and records subpoenaed but not produced. In line with the *Curcio* case, the district court below specifically upheld petitioner's right to invoke the Fifth Amendment with respect to questions concerning the whereabouts of the records (R. 159; *supra*, pp. 2, 3). The adjudication of contempt was based solely on the refusal to produce the subpoenaed records (R. 30-32, 44, 146, 198-199; *supra*, pp. 2-3). The *Curcio* decision sustains the government here. This Court there noted (354 U.S. at p. 127, fn. 7) that "petitioner might have been proceeded against for his failure to produce the records demanded by the subpoena *duces tecum*." See also *Nilva* v. *United States*, 352 U. S. 385; *United States* v. *Fleischman*, 339 U.S. 349; *United States* v. *White*, 322 U.S. 694; *Wilson* v. *United States*, 221 U.S. 361.

2. Petitioner's other contentions go to the sufficiency of the evidence to support the conviction. He argues that there was an insufficient showing by the government of the existence of the records, and a sufficient showing, through the testimony of the government witnesses, of good faith compliance on his part. Both courts below properly found to the contrary.

The district court was fully justified in inferring from the facts proved that the records were still in existence at the time the subpoena was served. As the court pointed out, the careful bookkeeping system testified to by government witnesses negatived the likelihood that all records relating to government contracts had disappeared. The dissolution of the corporation was of no significance since, under Section 106(5) of the New York Stock Corporation Law, a director of a dissolved corporation remains responsible for the maintenance of corporate records until an order is entered

by the state court permitting destruction.[2] The move, fire, and litigation testified to by government witnesses were never claimed to have resulted in destruction of records. Petitioner never attempted to excuse nonproduction on such ground. In short, the court had the right to believe that carefully kept corporate records, which should have been retained, did in fact continue in existence up to the time the subpoena was served. Cf. *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (C.A. 8), certiorari denied, 348 U.S. 916, where a corporate officer was held responsible for the unexplained nonproduction of corporate records even though the premises of the corporation had been padlocked. Here, nothing was shown to suggest that the records did not, as they would in normal course, continue to exist.[3]

The claim that petitioner's testimony to the grand jury that he produced the records he could find showed good faith compliance, is fully answered by the recent decision of this Court in *Nilva* v. *United States*, 352 U.S. 385, 395:

> Petitioner contends that his testimony that he attempted, in good faith, to comply with the subpoenas disproves the existence of any wilful default, and presents an "adequate excuse" for his

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[2] It is well established that the fact of dissolution does not change the duty of the custodian to produce corporate records. See *Grant* v. *United States*, 227 U.S. 74; *Wheeler* v. *United States*, 226 U.S. 478. Under Section 105(8) of the New York Stock Corporation Law, upon the voluntary dissolution of a New York corporation, the corporate entity continues to exist for the purpose of discharging its existing liabilities and obligations and it may continue to sue and be sued in its corporate name.

[3] In *United States* v. *Patterson*, 219 F. 2d 659 (Pet. 21), Patterson's possession of the records had been interrupted by service of a jail sentence, and other persons, who had access to the records, had an incentive to destroy the subpoenaed records.

> failure to comply under Rule 17(g), Federal Rules of Criminal Procedure. However, his protestations of good faith were subject to appraisal by the court that heard them. It was the judge of his credibility and of the weight to be given to his testimony. Lopiparo v. United States, 216 F. 2d 87, 91 [certiorari denied, 348 U.S. 916]. In our view, the trial court had sufficient basis for concluding that petitioner intentionally, and without "adequate excuse," defied the court.

Petitioner's attorney himself stated that no excuse was offered for non-production (R. 131).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1957.